Supreme Court of the United States

OCTOBER TERM, 1907.

No. 307.

CHARLES B. NEWTON, as Attorney-General of the State of New York, EDWARD SWANN, as District Attorney of the County of New York, and LEWIS NIXON, constituting the Public Service Commission of the State of New York, and the First District,

Appellants,

against

CONSOLIDATED GAS COMPANY OF NEW YORK,

Appellee.

GENERAL BRIEF FOR APPELLEE.

SHERMAN & STERLING,

Solicitors for Appellee,

[redacted] Wall Street,

New York.

[redacted] & GARVIN,

Of Counsel.

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Supreme Court of the United States,

OCTOBER TERM, 1921,

No. 257.

CHARLES D. NEWTON, as Attorney-General of the State of New York, EDWARD SWANN, as District Attorney of the County of New York, and LEWIS NIXON, constituting the Public Service Commission of the State of New York for the First District,
Appellants,

AGAINST

CONSOLIDATED GAS COMPANY OF NEW YORK,
Appellee.

GENERAL BRIEF FOR APPELLEE.

Statement.

Appeals by the defendants below from a final decree of the District Court of the United States for the Southern District of New York, entered August 4, 1920, upon the direction of his Honor, Judge Learned Hand, as amended on August 11, 1920.

NOTE: This brief will deal only with the more general aspects of the controversy. The facts and incidental rulings of law will be treated in detail in a separate brief.

Separate appeals have been taken by the complainant from certain conditional injunctive provisions contained in the final decree and in a modification of it made by Judge Hand on February 28, 1921. These appeals bear the numbers 258 and 288 and are based upon separate records. They will be considered in a separate brief.

By the final decree, as amended on August 11, 1920, the Court declared a statute (L. 1906, Ch. 125) confiscatory and void as to the complainant, which prevented the complainant from charging more than eighty cents a thousand cubic feet for gas furnished to its customers in the City of New York.

The suit was commenced in January, 1919; and, upon joinder of issue, Abraham S. Gilbert, Esq., was appointed Special Master, in May, 1919, to take the evidence and report it to the Court with his findings and recommendations (p. 23*a*).

The complainant gave detailed evidence of its operations for the year 1918 and for eight months of 1919 (p. 143*a*); and the record covering this period comprises almost 16,000 printed pages, together with about 1,000 exhibits.

By his report, dated May 5, 1920, the Special Master found that the fair value of the complainant's property, upon which it was entitled to an adequate return, was $74,854,351.14 (41*a*, sub. 70), while, on the Company's experience it would probably not receive, in 1920, a return of more than $898,700, or about 1.2% upon this valuation, which would represent a return, at the rate of 8% (which he considered reasonable), upon only $11,233,750. He, therefore, recommended the entry of a decree adjudging the statute to be illegal and void (42*a*, sub 77).

The organization of the Company in 1884, by the consolidation of six existing companies, the subse-

quent increases in its capital stock and the development of its business, are fully set forth in the opinion of the Master (43*a*-47*a*).

The case was brought on for final hearing before his Honor, Judge Learned Hand, who reached the conclusion that the statute was confiscatory, and directed a decree to be entered accordingly (p. 183*a*). He sustained nearly all of the material findings of the Master; but, in doing so he resolved every doubt in favor of the defendants; because, in any aspect of the case, it was perfectly obvious that the Company was not receiving an adequate return upon its investment (p. 183*a*).

The following are examples of this attitude of the Court: the amounts allowed by the Master for operating costs were materially reduced, by adopting the cost figures of only one of five manufacturing plants (being lower than those shown at the other four plants), as estimated by the defendants (p. 159*a*); by accepting the estimates of the defendants in regard to costs of distribution and other general costs (pp. 162*a*-167*a*); by reducing the percentage of gas unaccounted for from 7%, accepted by the Master, to 4.1% (pp. 35*a*, 153*a*); by assuming that there would be an increase in the sales for 1920 greatly in excess of those shown for 1918 and 1919 (p. 182*a*), an assumption which has not been justified by the event. Even after making all these allowances, as the result of extreme and excessive caution, the Court found that the return, on the basis of 1919 prices, which were higher than those of 1918 and which had continued up to August, 1920, when the final decree was entered, was not more than 3¼% on the "tangibles" alone, and might not be more than 1½% (183*a*).

Both the Master and the Court concluded that

this condition of the Company's business was not temporary, and that, owing to the steadily increasing cost of materials, the indications pointed to heavier operating expenses and smaller returns for the future (pp. 52*a*, 53*a*, 141*a*). The soundness of this forecast was demonstrated, when, in February, 1921, upon a motion made by the defendants to modify the decree, evidence was adduced by the complainant showing that even at the increased rate of $1.20 per thousand cubic feet, which had been allowed by the final decre (p. 194*a*), the Company was not paying its operating expenses (see Record in No. 288, p. 13).

POINTS.

FIRST.

The previous decision of this Court (212 U. S., 19).

The statute under attack in the present case (L. 1906, Ch. 125) is the same statute that was assailed by the Consolidated Gas Company in 1906, when the Act took effect. Based upon its experience in 1905, the Company then asserted that the effect of the eighty cent rate would be to deprive it of its property without due process and that certain provisions as to the maintenance of a maximum pressure were commercially impossible and, consequently, invalid; and it also asserted that the penalties imposed for a violation of the statute would be ruinous. It, therefore, asked that the statute be declared confiscatory and void.

The Circuit Court sustained the Company's contentions and directed a decree declaring the statute void as to it (157 Fed., 849).

Upon appeal, this Court, while expressing the opinion that the pressure and penalty provisions were invalid, held that they were separable and, therefore, did not vitiate the Act as a whole.

All of the legal propositions contended for by the Company at that time were sustained by this Court, with the exception of an allowance for going value and for the entire value of the special franchises. The Circuit Court had allowed $12,000,000 as the value of these franchises (157 Fed., 879). The allowance was reduced by this Court to $7,781,000, which was the amount at which the franchises

had been capitalized at the time of the consolidation in 1884.

The value of the real estate and plant was determined by the lower court upon conflicting evidence; and taking this into consideration and it appearing that the Company might perhaps receive as much as 6% from the eighty cent rate, in view of the possibility that the reduced rate might lead to increased consumption, this Court remitted the case to the lower court, without prejudice, so that an actual test might be made of the effect of the new rate.

SECOND.

The occasion for the present suit.

I. With the creation of the Public Service Commission in 1907 (L. 1907, Ch. 429), having full regulatory powers over gas companies and other public utilities, it would naturally be supposed that the gas companies would never again be obliged to appeal to the courts on the question of rates, unless the Commission should itself fix a confiscatory rate. Unfortunately for the companies and the courts, this expectation was not realized. While the legislature empowered the Commission to regulate rates, it inserted a provision in the Law which prevented the Commission from establishing a rate in excess of any maximum rate fixed by statute. Section 72 of the Law contained this provision:

> "After a hearing and after such an investigation as shall have been made by the Commission . . . the Commission, within lawful limits, may, by order, fix the maximum price of gas or electricity, *not exceeding that fixed by statute* to be charged by such corporation or person for the service to be furnished."*

Under the 1906 statute (*supra*), this limitation prevented the Commission from fixing a rate, in New York City, in excess of eighty cents.

> People *ex rel.* Municipal Gas Co. *v.* Pub. Serv. Com., 224 N. Y., 156.

The legislature was willing to confer the broadest possible powers upon the Commission, including the power to *reduce* rates; but it was not willing to

NOTE: A complete copy of the Public Service Commissions Law, as it existed in 1919, is submitted herewith.

trust its own creature with the power to *increase* rates, a power which the Commission was peculiarly fitted to exercise as the result of the other general powers conferred upon it; and the legislature, apparently for political reasons, chose to retain this power to itself. Whatever the reason, the Act of 1906 (L. 1906, Ch. 125; *post,* p. 58), establishing the eighty cent rate, remained on the statute book, rigid and unchanged, applying in omnibus fashion to the greater part of the territory occupied by the City of New York and having no regard to the cataclysmal changes wrought by the world war.

II. It was not until practically all the public utilities in New York City had been driven into the courts, and many of them into the hands of receivers, that, through the efforts of an enlightened Governor, who had previously sat with distinction upon the bench of the Court of Appeals, the law was amended, more than six months after the entry of the decree in the present case, by the repeal of the limitation on the powers of the Commission to establish a rate in excess of eighty cents (L. 1921, Ch. 134, taking effect March 30, 1921). The concluding portion of Section 72 of that Act, as thus amended, is as follows:

> "After a hearing and after such an investigation as shall have been made by the Commission . . . the Commission may, by order, fix just and reasonable prices, rates and charges for gas or electricity to be charged by such corporation or person for the service to be furnished, *notwithstanding that a higher or lower price has been theretofore prescribed by general or special statute.*"

The amendment, however, came too late for the Consolidated Gas Company and the other com-

panies operating in New York City, practically all of which were then asserting their rights in the courts, where they have obtained decrees in their favor, from which appeals are now pending in this Court.

III. By the decree of the court below declaring the eighty cent Act confiscatory, the Company was left free to establish reasonable rates, subject to the regulatory powers of the Commission.

Morrell *v.* Brooklyn Borough Gas Co., No. 1, 231 N. Y. 398.

In the present case, however, Judge Hand, in entering the final decree, granted injunctive relief only upon condition that the Company should not charge more than $1.20 per thousand cubic feet, and that all sums collected in excess of the eighty cent rate should be impounded and made subject to such rate as might be fixed by competent official authority on or before March 1, 1921. This provision was also extended to the fund that had been impounded under the order of the special Statutory Court in granting a preliminary injunction (196*a*). No such rate was fixed prior to March 1, 1921. An application made by the defendants in the latter part of February, 1921, to extend the period within which a rate fixed by competent official authority would be retroactive, was granted, and the period was extended until three months after the determination of the appeal to this Court (Record in No. 288, p. 64). After March 1, 1921, the limitation of $1.20 ceased to exist.

The present appeals, therefore, are concerned with the disposition of the fund thus impounded

under the preliminary injunction and final decree. The Commission now having the power, under the recent amendment of the statute (*supra*), to allow a higher rate than eighty cents, this Court will not concern itself with the effect of the eighty cent statute in the future.

It will thus be seen that while, in the previous litigation, the Gas Company was asking relief for the future, the present appeals do not in any way concern the future, but only the fund which has heretofore been impounded and which is being accumulated during the pendency of this appeal.

THIRD.

The standing of the three appellants.

I. *The Attorney General.*

The Attorney General was made a party defendant, because, "whenever the constitutionality of a statute is brought into question upon the trial or hearing of any action or proceeding, civil or criminal, in any court of record of original or appellate jurisdiction", he has the right to be made a party defendant, and, thereupon, "it shall be the duty of the Attorney General to appear in such action or proceeding in support of the constitutionality of such statute" (Executive Law, Sec. 68; L. 1913, Ch. 442).

II. *The Public Service Commission.*

Prior to the amendment of the Public Service Commissions Law in 1921 (L. 1921, Ch. 134), the Commission was under obligation, by reason of Section 74 of the Law, to enforce the eighty cent rate. The amendment of 1921, however, empowered the Commission to establish rates in excess of eighty cents a thousand; and with the decree of the Court in this case declaring the eighty cent Act confiscatory and void as to the Company, the Commission became an independent tribunal, charged with the duty of seeing that impartial justice was done between the Company and its customers. It was no longer required to combat the complainant's contentions in the suit at bar; and it has since acted accordingly, taking no active part in the present appeal. Obviously, if it had considered the decree erroneous, the duty of defending the statute would still have rested upon it, and it would have been

obliged to assume an active part in the prosecution of the appeal taken by it (p. 201*a*).

III. *The City of New York.*

The District Court denied the application of the City of New York to intervene in this case (256 Fed., 238). The decision was unanimously affirmed by the Circuit Court of Appeals (266 Fed., 1022). An appeal to this Court from the order of affirmance was dismissed (253 U. S., 219). The New York Court of Appeals has since then (July 14, 1921) held that, under the State statutes, the City is not a proper party to a suit of this kind; and it reversed a decision of the lower court to the contrary.

> Morrell *v.* Brooklyn Borough Gas Co., No. 2, 231 N. Y., 405.

The District Attorney of New York County had been made a party defendant because, by Section 1962 of the Code of Civil Procedure, the duty is placed upon the Attorney General and himself to recover the penalties prescribed for a violation of law. The provision of the Section on this point is as follows:

> "Where real or personal property has been forfeited, or a penalty incurred, to the people of the State or to an officer, for their use, pursuant to a provision of law, the attorney general or the district attorney of the county in which the action is triable, shall bring an action to recover the property or penalty in a court having jurisdiction thereof."

Obviously, the District Attorney was not a necessary party to the present suit, because the Gas Company had not violated the eighty cent Act and

had no intention of doing so, but appealed to the Court for protection against a statute which it claimed to be a nullity. The District Attorney was under no obligation to protect the statute assailed but merely to institute proceedings to recover the penalties if the statute should be disregarded. He might, therefore, very properly have been omitted altogether as a party defendant. In the previous litigation, the District Attorney took no active part in the controversy and did not join in the appeal to this Court (212 U. S., 19, 24).

But in the present case, after the City of New York had failed to obtain entrance to the suit upon its direct application, it slipped in through back-door methods, by prevailing upon the District Attorney to have the Corporation Counsel of the City substituted in place of the solicitor who had already appeared for the District Attorney (260 Fed., 244). A taxpayer might well raise the point that this conduct of the Mayor and Corporation Counsel, in applying the funds of the City to the defense of a suit in which the City had no interest or duty, and where the legislature had placed the duty of such defense upon other officers, was a waste of the public funds, which should be enjoined.

The presence of the Corporation Counsel in this litigation is thus officious rather than official; and he should be heard, if at all, only as *amicus curiæ*.

FOURTH.

The attacks upon the Special Master.

The empty character of the ponderous briefs filed on behalf of the Attorney General and the District Attorney is perhaps most conspicuous in the attacks made on the Special Master.

Out of the entire 119 assignments of error, the two which single out the Special Master for attack (assignments 4 and 5, pp. 202*a*-203*a*) are those on which the greatest stress is laid and to which the most space is devoted. The Corporation Counsel occupies 125 pages of his brief of 385 pages with this subject, for his first point. The Attorney General, who is the real party in interest, is more temperate, although he, too, makes this the first point of his brief.

The attitude of counsel for the appellants on this subject is that taken on all of the questions arising upon the appeal: one of extreme technicality, such as would be justified only in a criminal case where the accused person was on trial for his life.

I. *The appointment of the Special Master.*

The error claimed in regard to the appointment of the Special Master is without merit. It is asserted that because Judge Mayer, who made the appointment, was the Attorney General of the State of New York when the previous suit was instituted in 1906, and was consequently made a defendant in that suit, he was disqualified, thirteen years later, when, as District Judge, he appointed the Special Master. If the objection had any merit at all, it could have been taken only by the complainant. But the record in the previous case shows

that Judge Mayer soon ceased to be a party defendant, as his successor, Hon. William S. Jackson, was substituted as a party defendant before the appeal to this Court.

The present record, however, shows conclusively that when the application for the appointment of a Special Master was made before Judge Mayer, *no objection whatever was made on the part of the defendants* (p. 25*a*). Small wonder that the appellants do not refer to this alleged error in their briefs!

II. *Complaints in regard to the conduct and rulings of the Master.*

Error is claimed because the Master, on his own motion, without objection, ruled out about 1,000 "important and material" questions, limited the cross-examination of witnesses, "dispensed with common law proof", and otherwise conducted the hearings in a manner prejudicial to the defendants (Record, pp. 202*a*-203*a*).

The Master was appointed on May 16, 1919, and was required to conduct the hearings from day to day and, if necessary, to hold two sessions a day, so that the case might be brought on for final hearing on his report not later than the second Monday of October, 1919 (p. 25*a*). He was directed by the District Judge to allow the defendants until July 15, 1919, to prepare for trial (p. 43*a*). Thereafter, he complied scrupulously with the direction of the Court, and sat continuously through the summer and autumn of 1919 and into the following winter. How generous was the latitude allowed in the production of the evidence is seen in the present record of almost 16,000 pages of testimony, and, in addition, 1,000 tabulated exhibits.

So far from being able to comply with the suggestion of the Court, that the case should be brought to a final hearing in October, 1919, the Master was not able to make his report until May, 1920 (p. 42*a*), seven months later; and the case was not brought to a final hearing until July, 1920 (p. 186*a*).

Every presumption is in favor of a full and complete trial upon a record such as this, especially in a case tried without a jury.

1. The burden of appellants' complaint seems to be that, in the case of the complainant's proof, the Master did not conduct the hearing as if it had been an action at law and treat every objection by the defendants to the admission of evidence as if its decision would be controlling upon the final issue. At the same time, the appellants complain that the Master proceeded too strictly, when it came to their turn, in not allowing wider latitude in the admission of evidence offered by them, particularly in the cross-examination of witnesses.

Even in an action at common law, the court has control of the conduct of the case and can always limit the number of witnesses, or the extent of a cross-examination, or the evidence on a given issue.

The whole attitude of counsel for the defendants in the hearings before the Master was one of hostile opposition and violent and continuous objection and heated and insolent discussion; and the thousand objections which the Master himself interposed are but a trifling percentage of all the objections made by the defendants, with which this record teems.

2. The record as a whole shows that the Master allowed the greatest latitude to the defendants in the presentation of their proof; and instances of this are given in the brief of the Corporation Counsel (brief, pp. 90, bottom of 101, 104). If the Master had not exercised his authority to place some limit upon the hearings, the record would have assumed impossible proportions and the trial would have degenerated into a futility. The Consolidated Gas Company is undoubtedly the largest company of its kind in the world, its books and the records of its 500,000 consumers containing an infinitude of detail. What possibility of obtaining justice would there be for such a company, if the courts should recognize that every witness could be cross-examined indefinitely as to every single item that might possibly be connected with a particular subject? Unless the practical aspects of such a case are given proper weight, the courts become powerless.

The judicial attitude of the Master in the general conduct of the case is seen not only in the record taken as a whole, but in his opinion and findings; and throughout the case, the exceptional business knowledge and experience displayed by him, in addition to his legal attainments and acumen, show that he was peculiarly well fitted and equipped to conduct the hearings in a case of this kind and to place reasonable restrictions upon the zeal and activities of defendants' counsel.

3. In the recent case of Rowland *v.* St. Louis, etc., R. Co. (244 U. S., 106), Mr. Justice

Holmes, in the course of his opinion, referred to the manner in which the evidence had been presented, and said (p. 108):

> "It is enough to say that the Railroad adopted the only practicable mode of presenting its results, that it exhibited its work-sheets and data to the appellants, that the returns were made by the employees in the course of their business, and that if the appellants had desired to question any of the data, they could have called for further verification. It seems to us that technical rules are satisfied and that justice plainly requires this objection to be set aside."

That is the practice which was consistently pursued in the present case (pp. 6054-5); and the statisticians and accountants of the defendants were given every opportunity and facility and aid in the examination of the books of account and vouchers of the Company, and in checking up the tabulated statements that were submitted to them in advance of their being offered in evidence by the complainant. Mr. Brundage, who had general supervision of the Company's accounting department, testified explicitly, on August 13, 1919 (p. 1349), that this force of examiners employed by the defendants had been at work in making the examination of the books, vouchers and records of the complainant ever since the ninth of the preceding June, or more than two months (p. 1403); that a special room had been set aside in the Company's building for their convenience, and that a member of the complainant's accounting staff had been specially assigned to assist them in obtaining all the information they required (pp.

1404-5). And, throughout the trial, the record shows that the same facilities were at all times freely open to the defendants and their representatives (pp. 657-8, 1791, 6054-5); and the brief of the Corporation Counsel as well as the record show that the Master repeatedly pointed out to the defendants' counsel that this right was theirs and should be exercised where any item was in question (Brief, pp. 62, 65-6, 77; Record, pp. 6586-7, 6792-4, 6797-8; 8239-40).

In limiting the cross-examination of witnesses, the Master made this distinct statement to defendants' counsel (Corporation Counsel's brief, p. 53):

> "If you can show me before the complainant closes this case, that there is some witness that you want to ask some useful questions, I will call him back."

4. The Corporation Counsel devotes about one-third of his entire brief to disconnected extracts from the record, in an effort to discredit the conduct of the hearings by the Master. But an examination of them will show clearly that nearly all of his criticism, as well as that of the Attorney General, is directed against rulings of the Master which limited their right to cross-examine witnesses who produced tabulated statements from the books and records, in regard to each and every item of such statements; although the Master uniformly ruled that as to any item of which they complained, he would freely permit cross-examination (pp. 6399-6400).

Upon the hearings, each of the three defendants was represented by separate counsel. The Master ruled at the outset that, upon the cross-

examination of the complainant's witnesses, the Attorney General should first cross-examine, then the Corporation Counsel and following him counsel for the Commission (pp. 301-2). Obviously, where a given subject had been fully or largely covered by the cross-examination of the Attorney General, it would not have been proper for the Master to permit the Corporation Counsel or counsel for the Commission to go over the same ground with the same detail. Much of the outcry of the Corporation Counsel with the rulings of the Master has no other basis than rulings of this kind, where great latitude had already been permitted to the Attorney General, or where the proposed examination was not cross-examination at all and, for the most part, had reference to matters immaterial and irrelevant to the issue.

5. A few instances of the rulings which are so loudly complained of will illustrate the general character of most of them.

Counsel for the Attorney General, during his cross-examination of the complainant's expert accountant, who had prepared tabulated statements from the books of account of the complainant, asserted that he could not proceed "without having a regular cross-examination in the usual way" (Attorney General's brief, p. 39). He was asked what he meant by a "regular cross-examination", and answered:

> "I want him to tell us, *item by item, year by year,* how he made this up."

Again, when the same counsel was expostulating against the closing of a cross-examination, he said (brief, p. 44):

> "I wanted to get an answer *as to each item.*"

And, again (brief of Corporation Counsel, p. 63):

> "I have looked at the record, and I cannot see how I can escape asking him questions *about each item.*"

The same disposition was shown by the Corporation Counsel, who, in his brief (p. 49), referring to Exhibit 367, where the cross-examination had been restricted, said:

> "I intend to go through with my cross-examination of the witness on the whole subject of this Exhibit 367, asking him *as to each particular item*", etc.

He also complains of prejudicial error because he was not allowed to cross-examine a witness in regard to the fire insurance carried by the Company, in order to see whether the Company might not have been able to obtain better rates from companies other than those with which the insurance had been placed (brief, p. 81).

6. A glance through this voluminous record will give rise to something more than a mere suspicion, that it was part of the deliberate tactics of counsel for the defendants to multiply, argue and insist upon all possible objections, for the express purpose of prolonging the trial and exhausting the patience of the Master. The record is full of such instances, many of which are contained in the appellants' briefs, showing a complete disregard and even contempt, on the part of counsel for the defendants, for rulings of the Master distinctly made and repeatedly announced; and this disregard of the ordi-

nary proprieties was carried at times even to the extent of open defiance (see brief of Corporation Counsel for an instance of this on the part of the Deputy Attorney General, pp. 86-7). And in his own brief, the Corporation Counsel furnishes an example of his own insolence and contempt for the Master's rulings. On page 50 of his brief, after having occupied an entire page in stating what he wanted to draw out by the further cross-examination of a witness, he said:

> "Now that is the scope of the examination, *which only describes in general terms* what I have in mind, but it will give you *some* idea of the examination which I desire to enter into at this time, continuing along the lines already indicated. I state it thus, because I do not care to face a continual volley of 'objection sustained' or 'I won't allow the question', and have the record lumbered up with a number of exceptions on my part."

Other examples of the refusal of the Corporation Counsel to submit to rulings of the Master appear in his brief (pp. 69-71).

If, goaded by such contemptuous disregard of his rulings, the Master occasionally showed his annoyance, he merely gave expression to the righteous indignation which this persistent contumacy properly excited. He gave all his time, day after day, through the heat of summer, throughout the autumn and into the winter; and he would have been more than human if he had not occasionally given expression to his impatience with the petty and dilatory tactics of counsel disposed to introduce a political atmosphere into the court room. When the entire record is taken into consideration, it

shows an unusual patience and restraint on the part of the Master, under most trying conditions.

7. The Master's desire to prevent any unreasonable delay in the disposition of the case appears not merely in his rulings upon questions raised by the defendants' counsel, but also upon evidence offered by complainant's counsel and objections interposed by them. Much evidence offered on behalf of the complainant was excluded and many of the objections interposed by complainant's counsel were overruled. A few instances of this will illustrate the attitude of the Master (pp. 8819-20, 11657, 11659, 17207). Whether the Master was ruling against the complainant or against the defendants, the record shows that he invariably justified his rulings by sound considerations. And, if it were at all material, it could readily be shown that no important evidence, other than that which was merely corroborative, was excluded, and no rulings made by the Master against the objections of defendants' counsel which could possibly have affected the conclusion reached by him, and also by the Court, after a full and exhaustive hearing, at which the complaints now brought forward were fully presented and discussed.

8. The attack upon the Special Master met with the fate that it deserved in the lower Court, although, as we have heretofore pointed out (*ante*, p. 3), the Court, in order to be on the safe side, accepted in many instances the minimum values urged by the defendants rather than those found by the Master. This,

however, was not enough to satisfy the Corporation Counsel, who asserts in his brief (p. 13) that "neither before the Master nor before the learned District Judge, who heard and decided the exceptions to the Master's report, have the defendants had their day in Court". To justify this attack upon the Court, he quotes an alleged statement by Judge Hand (which forms no part of the record), to the effect that the attack upon the Master was not of such character as to require the Court to read every page of this interminable record. In that, he showed the good sense and balance of an experienced Judge, who was able to distinguish between the essential facts of the case and meaningless and immaterial incidents stressed by excited counsel.

FIFTH.

Judicial notice of controlling facts.

I. On the basis of the previous decision of this Court (212 U. S., 19), the present case might properly have been decided without taking any evidence, upon the judicial notice which the courts always take of facts universally known and undisputed; and this principle is expressly asserted and relied upon in the brief of the Corporation Counsel (pp. 142, 146-8). Judge Hand, in his opinion in the court below, said (p. 183*a*):

> "This result (the inadequacy of the return) was indeed to be expected. It is scarcely possible that a rate fixed in 1906 to give a fair return, and presumably no more than a fair return, should today be adequate."

This Court, in the Lincoln Gas case (250 U. S., 256), said (p. 268):

> "It is a matter of common knowledge that, owing principally to the world war, the costs of labor and supplies of every kind have greatly advanced since the ordinance was adopted, and largely since this cause was last heard in the court below. And it is equally well known that annual returns upon capital and enterprise the world over have materially increased, *so that what would have been a proper rate of return for capital invested in gas plants and similar public utilities a few years ago furnishes no safe criterion for the present or for the future.*"

II. No fact is better known than that the purchasing power of the dollar declined rapidly as the result of the entry of this country into the war, in 1917; so that by 1918, it had declined at least 50%.

This decline was carried still further in 1919 and 1920, profoundly affecting the ordinary living conditions of the nation, and, indeed, of the entire civilized world.

III. In the previous litigation, the lower court found that, under the 1905 conditions, the Company was not earning as much as 6%; and it held the statute void for that reason. This Court, having regard to the differences in the estimated values given by the experts to some of the properties, thought that possibly, under an actual trial of the eighty cent rate, the Company might earn as much as 6% and that this would not be confiscatory. But with that narrow margin under pre-war conditions, it must be inevitable, while the cost of every commodity was increasing two and three fold and the price of labor was advancing ever more rapidly, a company which could barely obtain an adequate return under an eighty cent rate in 1906 could not possibly do so in 1918 and the years following, when its taxes were greatly increased and when it was obliged to expend at least double the amount previously expended for labor and for materials (coal and oil), in which the advance in price was relatively greater than in commodities generally.

IV. The Court will also take judicial notice of the increase in rates granted during the past few years to public utilities in all parts of the country, all similarly affected by the universal advance in the costs of operation.

SIXTH.

The rate of return.

I. This Court recognized in the Lincoln Gas case (*supra*) that profound changes in general economic conditions had already (that is, in the early part of 1919) taken place, and that it was a matter of common knowledge that the annual returns sought and generally obtained by capital had materially increased, so that a rate of return which might have been proper a few years before could no longer be so. In January, 1909, when this Court rendered its decision in the previous suit brought by the Consolidated Gas Company, it expressed the opinion that a rate of less than 6% was confiscatory (212 U. S., 19, 49-50). In the Lincoln Gas case, the lower Court had held that a rate of 6% could not be regarded as confiscatory. This Court, in reviewing that decision in June, 1919, refused to accede to that conclusion, and said (250 U. S., 267):

> "We cannot approve the finding, that no rate yielding as much as 6% upon the invested capital could be regarded as confiscatory, in view of the undisputed evidence, accepted by the Master, that 8% was the lowest rate sought and generally obtained as a return upon capital invested in banking, merchandise and other business in the vicinity."

The Lincoln case was argued in October, 1917, only six months after the entry of this country into the great war; and the findings of the lower Court must have been based upon conditions which did not reflect the rapid and continuous increase in costs resulting from that untoward event.

II. The Special Master found in the present case, upon uncontradicted evidence, that a return of 8% upon an investment of this kind was necessary, in order to secure capital for its successful continuance (p. 61*a*). The District Court affirmed this finding, and said (p. 149*a*):

> "The evidence in this record indicates that 8% is the going rate at the present time; and that stands uncontradicted. For many months past, the United States, certainly the most solvent debtor in the world, has paid either six or nearly six per cent., and other governments higher."

Judge Hand might have added, that the United States had the very distinct advantage, in borrowing money, of providing that the income from its obligations should be wholly or in part free from any income tax.

III. During the past few years, corporations have been unable to borrow money, even on unquestioned security, on a more favorable basis than 8%; and this has been the price paid even by foreign governments which were not participants in the war and whose general credit was unimpaired. For a long period, the Federal Reserve Board maintained the rediscount rate in New York for prime commercial paper at 7%, although such paper also carried the guaranty of the discounting banks.

It is not conceivable that a gas company in the City of New York, with its rates subject to regulation, could obtain capital upon more favorable terms than those which prevailed where the credit was of the highest and where the security offered was of the best.

IV. If a rate of 8% is accepted as proper in the present case, the appeals taken by the defendants can be disposed of summarily; because, on no conceivable theory of valuation of the Company's properties, could it be found that the Company had been able, or by any possibility would be able in the future, to realize anything distantly approximating to that rate under the eighty cent limitation. On the basis of the minimum figures for the value of the property and the expenses of operation, the return for 1918 and 1919 did not exceed 3%; and the Master estimated the return for 1920 at not more than 1.2% (p. 41*a*). Judge Hand did not materially differ from the Master in this conclusion, although he assumed lower valuation and operating figures merely for the purpose of resolving every doubt against the Company; but even on such minimum figures, he held that the return derived by the Company was not more than 3¼% on the tangibles alone, and might not be in excess of 1½% (183*a*).

If the value heretofore placed by this Court upon the intangibles ($7,781,000) be included, the rate of return would, of course, be still less; and, as hereafter shown (*post*, p. 47 *et seq.*), this value must be included.

V. There is a further consideration, which no one experienced in business ever overlooks, and which the courts should not overlook if they would enable public utilities to serve the public efficiently. It is not enough that a business should be allowed a return upon the same prescribed basis as an investment in a government or municipal bond, or a secured obligation. If, for instance, 8% is sufficient to attract capital, where there is no element of business risk, the same return will not be sufficient in the case of industrial undertakings, all of which

are subject to fluctuations in earning power, owing to inevitable variations in conditions. Something more than a bare return on capital is, therefore, required and is provided in every conservatively managed business, even where there are no unusual risks. A business that has no power to expand by the use of some portion of its earnings is already marked for decay; and it is safe to assert that no business has ever been successfully built up in this country except by the employment of part of its net earnings.

This margin of safety even the banker insists upon who lends money on thoroughly seasoned collateral. It is a policy that is recognized both in Federal and State legislation; and it is well exemplified in the National Bank Act, which provides for the accumulation of a surplus of 20% before the directors are left free in the distribution of profits as dividends (Sec. 33); and similar provisions are contained in all the State banking and insurance laws.

VI. It is thus obvious that no such question is now involved as that which arose in the previous case, where a slight change in the value of the property and plant of the Company, or decrease in the expenses of operation, might have shown an adequate return. Technical objections to the admission or exclusion of bits of evidence, or the failure of the Master, in every instance, to conduct the hearing as if it were a jury trial in an action at law, become trifling and insignificant; while the fundamental and decisive facts stand out clear and distinct, completely overshadowing the petty fussiness in regard to this or that scrap of immaterial evidence.

SEVENTH.

Sufficiency of the test period.

The test period upon which the Master based his findings in the present case comprised the year 1918 and the first eight months of 1919 (p. 52*a*); and before the modified decree of February 28, 1921, was entered, the Court had before it the experience of the Company's operations for more than three years, as well as its own knowledge of the undisputed and controlling facts. This period the appellants now contend was insufficient; and they advance the proposition that if a prescribed rate gives an average return which is adequate over a "fairly long period of time" (p. 206*a*), mere inadequacy for a year or more is of no consequence, and any deficiency during such period may be made up by a return which in the past or future may have been or may be more than adequate.

I. If there were any merit in this contention, it should have been raised by the answer; but at the time the answers were served, the point had not been thought of.

II. The appellants assume that prior to 1918, the Company had received more than an adequate return upon the reasonable value of its property devoted to the public use. There is absolutely no competent evidence in the record to support this assumption. The complainant did not attempt to give detailed evidence of its operations prior to 1918; it would have been a practical impossibility to do so, and the present record of nearly 16,000 pages and more than 1,000 tabular exhibits would

have exceeded all practicable proportions and prolonged indefinitely the period during which the complainant was operating at a heavy daily loss.

III. In the absence of evidence on the point, the Court must assume that prior to 1918, the Company did not receive more than a reasonable return. By Section 65, sub. 1, of the Public Service Commissions Law, gas companies have, since June, 1907, been forbidden to charge more than a reasonable rate; and it has been the duty of the Commission to see that the law was enforced and that an unreasonable rate was not charged (Sec. 74). In the absence of express evidence to the contrary, the Company will be presumed to have complied with the law, and the Commission will be presumed to have performed its duty in seeing that the law was enforced and that an unreasonable rate was not charged. This obvious inference has been expressly recognized in a recent decision of the New York Court of Appeals (Municipal Gas Co. *v.* Commission, 225 N. Y., 89), where the Court said (p. 98):

> "There was no need to go back of 1917 and disclose the earnings of the earlier years. . . . We must presume indeed, until the contrary is shown, that they were only reasonable in amount; for unfair and unreasonable rates are prohibited by statute (P. S. C. Law, Secs. 65, 72). The plaintiff has the benefit of the presumption that it has acted within the law."

This decision of the Court of Appeals was unanimous; and the questions arising in rate cases of this kind were discussed with admirable brevity and clearness in the opinion written by Judge Cardozo.

IV. While the Court must presume that the Company did not receive more than an adequate return prior to 1918, it does not necessarily follow that it received as much as that. If it should be assumed, on the basis of this Court's decision when the previous case was before it (212 U. S., 19), that a return of 6% was not confiscatory, then inasmuch as the return received depends on conflicting evidence as to the values, allowances for working capital and other disputable items, it is certain that the Company would not again appeal to the courts unless the deficiency in the return was so substantial that there could be no reasonable doubt of its success; for the cost of such a litigation, not merely in the outlay required for obtaining complete inventories and for the services of accountants, expert appraisers and counsel, but in the vast amount of time that must necessarily be devoted to the preparation of the case for trial by the officers of the Company, thus interfering seriously with the proper performance of their official duties in an exacting business, would act as an effectual deterrent to renewed litigation; while, added to all this, is the important consideration of the relations of the Company to the public, the inability of the large body of consumers to appreciate the fact that corporations cannot prosper under any and all conditions, and the temptation of irresponsible journalism to exploit this ignorance for unworthy political ends.

It may safely be assumed, therefore, that the fact alleged in the bill of complaint (Article 21, p. 6*a*), which was duly verified by Mr. George B. Cortelyou, the President of the complainant (p. 9*a*), that the Company had not received as much as 6% during the interval between 1909 and 1918 was correct, even though the complainant found it impracticable to give detailed evidence of it.

This conclusion finds express support in Plaintiff's Exhibit 498 (Record, pp. 17447), which was received in evidence to rebut certain unwarranted tabulations offered by the defendants, as it shows that in only three years from 1906 to 1917, inclusive, did the Company receive as much as 6% upon the value of its property, and that, for the entire period, it averaged less than 4½%. In 1915 and 1916, the return was only about 5%, and in 1914 and 1917, only a little more than 2%. These figures reflect the actual results of the operations of the Company as shown by its books and records, kept under the supervision and in accordance with the rules and regulations of the Public Service Commission.

V. Even, however, if it should be assumed, for the sake of the argument, that the Company had received an adequate return prior to 1918, yet, as it must also be assumed that it received no more than an adequate return, there was nothing in that prior period which could make up for the loss subsequently occurring. The same is true of any subsequent rate.

The great body of the 500,000 consumers (p. 7a) of complainant is changing from year to year, from month to month and from day to day. Each one of them is entitled, at the time he obtains service, to a reasonable rate for that service; and the only possible way in which that rate can be made reasonable is to adapt it to the changing conditions. This is what the Court of Appeals had in mind in the Municipal Gas case, when it said (225 N. Y., 96):

> "A statute prescribing rates is one of continuing operation. It is an attempt by the legislature to predict for future years the charges

that will yield a fair return. The prediction must square with the facts, or be cast aside as worthless (*Ex parte* Young, 209 U. S., 123, 147, 148). It must square with them in one year as in another, *at the beginning but equally at the end.* In all such legislation, from the hour of its enactment, there thus inheres the seed of an infirmity which the future may delevop. . . . This is as true of a regulation which looks forward a year as of one which looks forward a decade or a century . . . The condition is that the rates shall remain in force at such times and *at such only* as their enforcement will not work denial of the right to a fair return. When the return falls below that level, the regulation is suspended."

VI. This elasticity in the rate charged by a public utility is just as essential to the successful prosecution of its business as in the case of any other commercial enterprise. It is a fundamental principle in the law of economics; and disregard of it inevitably brings disaster. The principle is universally applied by both State and Federal Governments, in the creation of regulatory commissions; and it is expressly recognized in the Public Service Commissions Law of New York.

1. The rates charged must *at all times* be reasonable (Sec. 65, sub. 1).

2. The Commission, on its own motion, may, *at any time,* institute an inquiry into the reasonableness of a rate, and may, upon investigation, fix such rate as it deems reasonable (Sec. 72).

VII. As we have just seen (*ante*, p. 34), the New York Court of Appeals, in the Municipal Gas case, has expressly recognized that, in fixing a rate or empowering a commission to establish rates, the

legislature must permit an adequate return at all times, taking into consideration the ever changing conditions. In that case, the Court of Appeals expressly held that a test period of one year and six months, with a prospect of the continuance of the conditions complained of, was sufficient; and in considering the general question, the Court said (p. 98):

> "It is by the average of the year that business commonly reckons its losses and its gains."

This construction of a State statute by the court of last resort will be accepted by this Court as conclusive.

> Merchants Bank *v.* Pennsylvania, 167 U. S., 461;
> Schaefer *v.* Werling, 188 U. S., 516;
> Peoples Nat. Bank *v.* Marye, 191 U. S., 272, 276.

The Appellate Division of the Supreme Court of New York, in a unanimous decision of five Justices, adopted the same view, in a case where the period under investigation was slightly more than two years.

> Bronx Gas, etc., Co. *v.* Commission, 190 A. D., 13.

The opinion in that case was written by Mr. Justice Page, who, as State Senator, introduced, in 1907, the bill which became the Public Service Commissions Law and who is generally reputed to have been the author of the law, in conjunction with Hon. Charles E. Hughes, then the Governor of the State. And Judge Hughes, as Referee to hear and determine all the issues in an action brought by the Brooklyn Borough Gas Company against the Commission (17 State Dep. Rep., 81, P. U. R. 1918

F, 335), held the statute to be confiscatory as against the Gas Company, which relied upon its experience for the last half of 1916 and for the year 1917. In the course of his opinion, he said:

> "The conditions are abnormal but they exist. The plaintiff is *at all times* subject to regulation. If its profits rise through decreased operating costs, its rates are subject to reduction. It may insist at any time only upon a fair return; and it is essential to the protection of the public, through the continuance of its service, that it should have a fair return when its revenues are depleted by increased operating expenses."

The same principle had been stated by Mr. Justice Hughes, in writing for a unanimous Court in the Missouri Rate Cases (230 U. S. 474, 508).

Why it would be unwise to attempt to keep in operation a confiscatory rate over an extended period was stated by this Court with much emphasis in the Knoxville case (212 U. S., 18):

> "Our social system rests largely upon the sanctity of private property, and that state or community which seeks to invade it will soon discover the error in the disaster which follows. The slight gain to the consumer, which he would obtain from a reduction in the rates charged by public service corporations, is as nothing compared with his share in the ruin which would be brought about by denying to private property its just reward, thus unsettling values and destroying confidence."

VIII. This Court has itself repeatedly accepted the test of a year and less as sufficient.

> *Ex parte* Young, 209 U. S., 123 (one year);
> Knoxville *v.* Water Co., 212 U. S., 1, 7 (one year);

Willcox *v.* Consolidated Gas Co., 212 U. S., 19 (one year);

Minnesota Rate Cases, 230 U. S., 352, 469-472 (one year);

Northern Pac. Ry. *v.* North Dakota, 236 U. S., 585, 589 (one year);

Rowland *v.* St. Louis, etc., R. Co., 244 U. S. 106 (two months);

Lincoln Gas Co. *v.* Lincoln, 250 U. S., 256, 268 (conditions at time of commencing suit).

In the Lincoln Gas case, this Court, in dismissing the bill of complaint without prejudice, in order that there might be a practical test of the rate complained of, said (p. 268):

> "The decree ought to be modified so as to permit complainant to make another application to the courts for relief against the operation of the ordinance hereafter, if it can show, as a result of its practical test of the dollar rate since May 1, 1915, or upon evidence respecting values, cost of operation and the current rates of return upon capital *as they stand at the time of bringing suit and are likely to continue thereafter*, that the rate ordinance is confiscatory in its effect under the new conditions."

In Kansas City Southern Railway Co. *v.* Int. Com. Com. (252 U. S., 178), the Court ordered the Commission to value the property of the Railroad Company according to the principle of additional costs recognized by Congress. No one thought of requiring a prolonged period to be taken, but present conditions were assumed to be controlling.

In commenting on the opinion in Darnell *v.* Edwards (244 U. S., 564), where this Court held that

upon the peculiar facts there shown, the period was insufficient, the Attorney General, in his brief (p. 152), makes the erroneous statement that "the period under consideration in that case was from September 10, 1913, to March 31, 1914"; and Judge Hand, in his opinion in the court below, fell into the same error, in assuming that the period was one of six months (Record, p. 143*a*).

While the rate complained of in that case went into effect on September 10, 1913, the railroad was not completed until June, 1914, or more than two months subsequent to the period covered by the evidence. Moreover, such business as the unfinished road could take care of in hauling logs to the Darnell mill was cut off by a fire which destroyed that mill in the previous June, 1913. The only business of the railroad apparently was that of carrying lumber, and it did not have another outlet for such business until the construction of a new mill, which was not put into operation until March 17, 1914. The period covered by the evidence was thus in reality only two weeks, and not six months. The case was entirely devoid of any evidence upon which the future business of the Company could be estimated.

The real question in all these cases is whether the period covered by the evidence is fairly typical. This was recognized in Rowland *v.* St. L. & S. F. R. Co. (244 U. S., 106), decided at about the same time as Darnell *v.* Edwards. In the Rowland case, the period of actual test was only two months, as to which this Court, speaking by Mr. Justice Holmes, said (p. 109):

> "We agree with the District Judge that the two months of investigation afforded a basis for argument as to constant conditions."

IX. On November 26, 1920, the Statutory Court in the Southern District of New York, in granting or enlarging preliminary injunctions in the case of nine Gas Companies, found that "none of these nine plaintiffs can make or produce and distribute gas to private consumers for less than or close to $1 per thousand cubic feet. Indeed, we are convinced that some of them must expend at present, in order to make and distribute gas, slightly more than $1 per unit."

In this conclusion, the Court allowed nothing for a return on the investment.

N. Y. Mutual Gaslight Co. *v.* Newton, 269 Fed., 452; and eight other cases.

Preliminary injunctions had previously been granted by the same Court to six of these companies (subsidiaries of the Consolidated Gas Company), in the early part of the year. In its opinion in the Mutual Gaslight case (*supra*), the Statutory Court said (p. 453):

> "We have previously held, in granting the orders above enumerated, that all these plaintiffs (except the Brooklyn subsidiaries) are not now and, so far as can reasonably be foreseen, will not be able in the future to manufacture and sell gas at the statutory rate, except at an actual loss."

It thus appears, that the experience of practically all the gas companies operating in the City of New York was substantially the same down to the close of 1920, and that the mere cost of making and distributing gas at that time was about $1 per thousand cubic feet; and, as heretofore pointed out (*ante*, p. 4), this cost continued to increase down to the end of February, 1921, when, at the

$1.20 rate, the Consolidated Company was operating at an actual loss. This was four and one half years after the beginning (July 1, 1916) of the period covered by the opinion of Judge Hughes in the Brooklyn Borough case (*ante*, pp. 36-7).

When increased operating expenses have continued for more than four years, with no prospect of diminution, they have certainly ceased to be "abnormal", although they may be in excess of those which prevailed in a time of profound peace. The world war was a cyclone, prostrating all industries; and no one of mature age can expect to see the pre-war conditions completely restored in his lifetime.

The finding of the Master, that costs of operation in 1919 exceeded those of 1918 (p. 31*a*) was uncontradicted and was confirmed by the Court (p. 193*a*). The Master also expressly found (p. 32*a*, Finding 28) that

> "The evidence adduced in this record affords no grounds for expecting that the prices of materials or the wages paid to labor will be reduced during 1920 or 1921, or, at any time which can now be forecast."

An exception to this finding was overruled by the Court (p. 193*a*), which, in its opinion (p. 141*a*) stated the reasons for concluding that the existing conditions were likely to continue.

Since the entry of the modified decree in this case on February 28, 1921 (Record, No. 288, p. 63), this Court will take judicial notice of the fact that there has been little change in the general labor situation, and even less in the price of coal, which enters so largely into the cost of gas (30*a*-33*a*; 193*a*). If the Court were in the slightest doubt as to this, it

could readily be verified by directing the evidence as to operating costs to be brought down to date.

X. In the numerous rate cases recently brought by the gas companies in the Southern District of New York, all of the Judges, including those who constituted the Statutory Court on preliminary motions for an injunction, regarded a comparatively short period as sufficient.

Bronxville Gas Co. *v.* Barker, 231 Fed., 331, 333 (eight months);

Brooklyn Union Gas Co. *v.* Nixon; not yet reported (decision of the three Judges composing the Statutory Court on preliminary injunction, where the period taken was 1918 and ten months of 1919);

Joplin, etc., Ry. Co. *v.* Commission, 267 Fed., 584.

In the Joplin case (*supra*), the Statutory Court, on application for a preliminary injunction, said (p. 587):

> "Nor can we say that the present period of high prices is so temporary or abnormal that it may practically be disregarded in arriving at the value of complainant's properties. No one can say what degree of depression may ultimately come; but it is reasonably certain that the cost of the properties now under consideration will never again approximate figures prevailing in the years before the world war."

On the application of the Consolidated Gas Company in the present suit for a preliminary injunction, the Statutory Court (Judges Ward, Grubb and Knox) held that the period of one year under

investigation was sufficient and granted the injunction (not reported but referred to in the final decree as amended; p. 196*a*, sub. 14), and said:

> "It is suggested that a period of experimentation has not elapsed sufficient to enable us to say whether the eighty cent rate is confiscatory. We think it is quite sufficient."

Similar views were expressed in other recent cases pending in the Southern District of New York.

> N. Y. & Queens Gas Co. *v.* Newton, 269 Fed., 277, 289 (Mayer, *D. J.*);
> Kings County Lighting Co. *v.* Nixon, 268 Fed., 143, 147 (Hough, *C. J.*).

In his opinion in the present case, Judge Hand, in commenting on the period, said (p. 75):

> "The Master has taken complete evidence over a period of twenty months, from January 1, 1918, to August 31, 1919. Since that time, eleven more months have passed, during which there has been no fall in the price levels. The record has some evidence of this down to a later date, but, of course, not down to the date of this opinion. That evidence is not necessary in the face of so patent and obstrusive a fact of daily life; and it is quite fair to say that the condition which the Master found as of August 31, 1919, has been aggravated during the succeeding years."

This view of the situation was fully justified by subsequent events; for it was shown at the end of February, 1921, upon the application of the defendants to modify the decree, that a rate of $1.20 at that time was confiscatory (Record in No. 288, p. 13).

XI. In a very recent decision of the Supreme Court of New Jersey (Public Service Ry. Co. *v.* Commission, decided July 1, 1921, but not officially reported), an order of the Public Service Commission was set aside which refused to approve an increase in the rates filed by the Company. The Commission gave as the reason for its action that the business conditions were temporary and in the nature of an emergency. This suggestion the Court disposed of with manifest impatience and a touch of sarcasm:

> "The Board, in its report of its conclusion, denies relief from these conditions and treats the situation as an emergency which will soon pass. . . . There is no evidence in this record from which it can be inferred that the present cost of operation and maintenance will not continue and with it the so-called emergency, until its victim shall have collapsed, to the great injury of its stockholders, and especially the public, who depend upon it for transportation. . . .
>
> The relief was denied upon the ground that the conditions creating the deficit were the result of a sudden happening, producing a crisis temporary in character, which the Board called an emergency. Why an increased tax, enhanced cost of labor, of operation and of necessary repairs, should be called an emergency soon to be assuaged, like a sudden flood, is not apparent to us either from the evidence or conditions of which we can take judicial notice; nor, as the Board did, can we assume that other conditions will shortly exist."

XII. These numerous decisions and the fact that no State officials ever heretofore thought of raising the question that a test of a year's operations was not sufficient, reflect the common sense view of a situation which is perfectly plain and simple. Not

only is all ordinary commercial business conducted on the basis of yearly results, as the Court of Appeals said in the Municipal Gas case (*ante,* p. 32), but all business activities are similarly measured and estimated.

1. The Public Service Commissions Law itself recognizes this, in requiring the public utility companies to make annual reports of their operations (Sec. 66, sub. 5).

2. The New York State income tax is based upon annual returns (Tax Law, Sec. 367).

3. This is also true of the Federal income and excess profits tax returns and the capital stock tax returns of corporations and individuals.

4. Without exception, under both State and Federal laws, the directors and officers of corporations are elected for the term of a year.

5. In all banking business, the credit extended is based upon the annual experience of their customers and the taking of annual inventories.

6. Any business man would speedily come to grief if he established a scale of charges in 1906 and adhered to them for a period of ten or twelve years, in order to see how he would come out at the end of that period. It is only by keeping his eyes open to the varying conditions of the market and adapting his prices accordingly that he can expect to keep pace with his competitors. This readiness to take advantage of constantly changing conditions is the very test of successful competition, upon

which all business success is predicated and which, we are assured, is the life of trade.

7. Capital could not be obtained for public utilities if the investor should be required to wait for a prolonged experiment in the establishment of rates, in order to see what would be their ultimate effect.

8. The argument of an extended test of a given rate is based upon the assumption that a corporation is a single entity, which can afford to take the bad with the good and average the results over decades. Where the investment of capital is concerned, however, corporations consist only of their stockholders and creditors; and in the case of a corporation like the Consolidated Gas Company, with more than 8,000 stockholders (p. 8332), the individual holders of its stock and obligations are constantly changing; and the credit of a large corporation would speedily be impaired if the stockholders at a given time should be informed that the return upon their investment must be deferred until more favorable conditions should prevail, which might be never. The stockholders of 1918, or 1919, or 1921, are not obliged to submit to loss merely because the stockholders of 1910 to 1918, or some of them, may have received an adequate return upon their investment, or because possibly the stockholders of 1921 to 1931, or some of them, may receive such return; and investors generally would be very chary of purchasing the obligations of a corporation whose profit and loss statement, even for a single year, showed no return upon the capital invested.

EIGHTH.

The special franchises.

I. The Consolidated Gas Company was organized in 1884, by the consolidation of six gas companies operating in the City of New York. At the time of the consolidation, the special franchises of these six companies were capitalized at $7,781,000, and full paid capital stock of the Consolidated Company was issued to that amount, in payment. The capitalization of the Company was subsequently investigated by a Committee of the Legislature, in 1885. Upon the report of the Committee, the Legislature never took any action; and it has never questioned the propriety of this capitalization (p. 46*a*).

In the previous litigation over the eighty cent statute, the Circuit Court allowed to the complainant the sum of $12,000,000, as the value of its special franchises, including the item of $7,781,000 (157 Fed. 849, 879). This Court confined the value to the $7,781,000, at which the franchises had been capitalized; and, upon this point, the Court said (212 U. S., 47):

> "We think that under the above facts the courts ought to accept the valuation of the franchises fixed and agreed upon under the Act of 1884 as conclusive at that time. The valuation was provided for in the Act, which was followed by the companies; and the agreement regarding it has been always recognized as valid, and the stock has been largely dealt in for more than twenty years past on the basis of the validity of the valuation and of the stock issued by the company."

This same amount was allowed in the present case in the Court below, upon the ground that the question was *res adjudicata* (p. 147*a*). In that conclusion, the Court was obviously correct, as the ground of this Court's decision in the previous case has much greater force now than it had then. If, in 1905, the stockholders and creditors had the right to rely upon a capitalization twenty-one years previously, that right has certainly grown more secure with the passing years. Ever since the previous decision of this Court, in January, 1909, investors in the capital stock and obligations of the Company have been entirely justified in relying upon that decision as establishing a property right in the special franchises, to the amount of $7,781,000.

> Gelpcke *v.* Dubuque, 1 Wall., 175, 206;
> Muhlken *v.* Harlem R. R. Co., 197 U. S., 544.

In the latter case, the New York Legislature had required the Harlem Railroad Company to erect in Fourth Avenue, in place of a subway which it had previously maintained for many years, a steel viaduct, so as to permit the free use of the street to the public. The Court of Appeals had previously held, in the Elevated Railroad Cases, that the elevated railroads deprived the abutting owners of their easements of light, air and access, for which the owners were entitled to recover damages. But in the Harlem case, the Court of Appeals held (173 N. Y., 548) that the principle of the Elevated Railroad Cases did not apply, because the change amounted merely to a change of grade, in the public interest, and was mandatory upon the Railroad Company, and, therefore, that the Company was

not liable for consequential damages. This Court reversed the decision of the Court of Appeals and held that the Elevated Railroad Cases had established a rule of property upon which subsequent purchasers had the right to rely. In the course of its opinion, the Court said (p. 570):

> "When the plaintiff acquired his title, those cases were the law of New York and assured to him that his easements of light and air were secured by contract as expressed in those cases and could not be taken from him without payment of compensation. And this is the ground of our decision. We are not called upon to discuss the power or the limitations upon the power of the courts of New York to declare rules of property or change or modify their decisions but only to decide that such power cannot be exercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States. . . . Hence, the importance of the Elevated Railroad Cases and the doctrine they had pronounced when the plaintiff acquired his property. He bought under their assurance."

In the previous case, the record in this Court showed that the Consolidated Gas Company had a capital stock of $80,000,000. At present, the authorized capital stock of the Company is $125,000,000, of which $100,000,000 has been issued and is now outstanding; and it has also outstanding 7% convertible bonds, of a par value of $25,000,000, which have been issued since the previous litigation (46*a*). There can be no doubt that these issues were taken by the public in reliance upon the decision of this Court that the Company had the right to earn a return upon its special franchises to the extent of $7,781,000.

II. The appellants now suggest that the Court should disregard its previous decision, on the ground that the franchises thus capitalized have ceased to exist; but their sole reliance for this suggestion is that one of the franchises (the Anthracite Grant) of one of the six companies (the Knickerbocker Company) expired in 1913.

No such defense was set up in any of the answers, which the New York Court of Appeals stated was necessary, where the Company was actually using the public streets.

> People *ex rel.* New York City *v.* N. Y. Rys. Co., 217 N. Y., 310, 318.

The Special Master and the Court below found against the defendants on this contention (pp. 27*a*, 148*a*); and properly so.

1. Franchises proceed from the State and not from the municipality, unless the municipality is expressly authorized to grant them.

> City of New York *v.* Bryan, 196 N. Y., 158, 165-6;
>
> People *ex rel.* City of New York *v.* N. Y. Rys., 217 N. Y., 310, 315-6;
>
> Pawhuska *v.* Pawhuska Oil Co., 250 U. S., 394, 399.

Prior to the creation of the Greater New York, in 1897, the City had no power to grant special franchises.

2. Unless expressly limited in the grant, franchises are perpetual.

> People *v.* O'Brien, 111 N. Y., 1, 38, 40;
>
> Trustee of Southampton *v.* Jessup, 162 N. Y., 122, 127;

N. Y. Central, etc., R. R. Co. *v.* New York, 202 N. Y., 212;
Northern Ohio Traction Co. *v.* Ohio, 245 U. S., 574, 585.

3. In the case of the New York Mutual Gas Light Company, its franchise, which was granted by a Special Act (L. 1866, Ch. 351), was in the following language:

"The said corporation shall have full power and authority to manufacture, make and sell gas and to light any part of the City of New York . . . provided that no public street or highway in the City shall be dug into, injured or defaced without the permission of the municipal authority thereof first had and obtained."

In 1868, the City gave its consent in the following language:

"Permission be and the same is hereby given to the New York Mutual Gas Light Company of the City of New York to lay pipes for conducting gas through the streets, avenues, lanes, alleys and squares in the said City, *for the period of thirty years*, to be subject to the same restrictions as to the mode of laying down said conductors as apply to and govern the *New York* and *Manhattan Gas Light Companies* in that respect."

The Appellate Division of the Supreme Court unanimously held, on demurrer, that this franchise of the Mutual Company was perpetual (City of New York *v.* N. Y. Mutual Gas Light Co., 135 App. Div., 260, 267), and that the attempted limitation by the City to thirty years was ineffective, and, in any event, could have no effect upon the pipes laid during the thirty year period. From the final judgment

subsequently entered on this decision, an appeal was taken, through the Appellate Division (140 App. Div., 911) to the Court of Appeals, which reached the same conclusion (207 N. Y., 647), substantially adopting the opinion of the Appellate Division but holding unequivocally that the provision requiring the consent of the municipal authorities related only to the manner of opening the streets for the purpose of laying the pipes and did not limit the duration of the franchise.

The two Companies (the New York and the Manhattan) referred to above in the permission given by the City to the Mutual Company, had special charters practically identical in language with that of the Mutual Company (L. 1823, Ch. 85; L. 1830, Ch. 59; Record, pp. 15924, 15928). They were two of the consolidating companies included in the consolidation of 1884, by which the Consolidated Gas Company was created. Two of the other six consolidating companies were the Knickerbocker and the Metropolitan, both of which were organized under similar special charters (L. 1855, Ch. 545; L. 1871, Ch. 944; Record, pp. 15933, 15937).

4. The Corporation Counsel makes no allusion in his brief to the case of the Mutual Gas Light Company. In the brief for the Attorney General, an effort is made (p. 187) to distinguish that case, by showing that the Mutual franchise contained a proviso dispensing with the municipal consent, if a majority in interest of the adjacent property owners gave their written consent to have the streets dug into,

and that there was evidence that such consent had been given.

Obviously, that alternative was immaterial, inasmuch as the municipal authorities did give their formal consent, and the consent of the property owners was, therefore, not required and was of no possible consequence. The entire contention of the City in that case was that the municipal consent limited the franchise to thirty years; and this contention the courts overruled. Upon this point, the Appellate Division said (135 App. Div., 260, 267):

> "The corporation having a perpetual franchise from the State, subject to no limitations thereof by the local legislative body, the permission given by the resolution of the common council hereinbefore quoted, with its limitation of thirty years to lay pipes, was ineffective as a limitation upon the power given by the Legislature under the franchise granted to the defendant."

The Court of Appeals approved of the reasoning of the Appellate Division, and, upon the construction of the franchise clause of the Act under which the Mutual Company was incorporated, it said (207 N. Y., 646, 647):

> "We content ourselves with a mere statement of our conclusion on the *fundamental* question involved We think that under the only interpretation which justifiably can be placed on the special act incorporating the defendant (L. 1866, Ch. 651), it acquired a full and complete franchise and right to manufacture and sell gas in the City of New York, and, for that purpose, to use the streets, and was not required to obtain from the municipal authorities what has come to be termed a secondary franchise; that the

provision requiring it to obtain either the permission of property owners or of municipal authorities before any street could be 'dug into, injured or defaced', simply related to a permission to be secured from the property owners or administrative authorities of the City regulating merely the conditions of tearing up the streets for the purpose of putting down pipes."

5. Another of the six consolidating companies was the Harlem Gas Light Company, which had a perpetual charter and included all that part of the City north of Seventy-ninth Street (p. 16,258 *et seq.*).

6. Whether or not the Anthracite Franchise, which was only one of the two franchises owned by the Knickerbocker Company, expired in 1913, is of no consequence. The Consolidated Company still possesses more franchises through the other consolidating companies than it has any occasion to use. A single franchise that is perpetual serves the purpose of the Company quite as effectually as a dozen.

III. Even if it should be conceded, for the sake of the argument, that the City had the power to limit the period during which mains might be laid in the streets, although the Court of Appeals held to the contrary in the Mutual case (*supra*), this power would not limit the right and duty of the Company to use and maintain the mains which had been laid during the permissible period.

City of New York *v.* N. Y. Mutual Gas Light Co., 135 App. Div., 260, 268; aff'd. 207 N. Y., 647.

And the lower Court in the present case found that the streets of New York were already so completely occupied with subway structures that no space was left in them for laying additional mains (148*a*).

IV. If the Consolidated Gas Company had no power after 1913, as contended by the appellants, to maintain its mains in the streets, it would ever since have been a trespasser and a wrongdoer. In the absence of clear proof to the contrary, this Court will not presume that the public officials have been so remiss in their duty as to permit such a condition to continue for so long a period. It will presume that they have done their duty and did not take action against the Company, because they realized that it had the right to continue the occupation of the streets.

In People *ex rel.* New York City *v.* N. Y. Rys. Co. (217 N. Y., 310), the Court of Appeals, in considering the right of a street railway company to occupy the streets, said (p. 318):

> "When a railroad has been constructed and operated for a long period of time, the courts will presume that an assent required by law was given. We must *conclusively* presume, in the absence of allegation and proof, that the tracks of the company were lawfully placed and have lawfully remained in their present location."

V. It makes no difference, in a case of this kind, whether the Company has a perpetual franchise or whether it is merely occupying the streets under a revocable license. So long as it is performing its duty, which the law places upon it, of supplying the public with gas, with the acquiescence of the

municipal authorities, it is entitled to an adequate return upon all its property as a going concern.

Denver *v.* Denver Union Water Co., 246 U. S., 178;

Detroit United Ry. *v.* Detroit, 248 U. S., 429, 435.

In the Denver case, the franchise of the Company had expired in 1910. It continued to supply water to the City and its inhabitants until 1914, when the City adopted an ordinance reducing the rates to be charged. This the Company contested, on the ground that the new rates did not afford it an adequate return. As a defense, the City relied upon the expiration of the franchise. But this Court held that the Company had a right to a reasonable return upon its property so long as it continued to supply the water; and the same principle was again distinctly enunciated subsequently, in the Detroit case.

NINTH.

The decree of the lower Court, as amended and modified, should be affirmed, with costs, except that the form of the decree should be further modified by the elimination of the conditional and retroactive provisions complained of in the separate appeals taken by the company in the Cases Nos. 258 and 288.

Washington, October 24, 1921.

SHEARMAN & STERLING,
Solicitors for Appellee.

JOHN A. GARVER,
Of counsel.

APPENDIX.

Complainant's Exhibit 12.

(L. 1906, Ch. 125.)

An Act in relation to illuminating gas in the City of New York and regulating the quality and pressure thereof and the price to consumers other than said city and providing a penalty for violation.

Became a Law April 3, 1906, with the approval of the Governor. Passed, a majority being present.

Accepted by the City.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. A corporation, association, copartnership or person engaged in the business of manufacturing, furnishing or selling illuminating gas in the city of New York, except in the fifth ward of the Borough of Queens and in that portion of the Borough of the Bronx formerly contained in the towns of Eastchester and Pelham, shall not charge or receive for gas manufactured, furnished or sold in said city a sum per one thousand cubic feet in excess of the following rates:

1. In the Borough of Manhattan, in the first ward of the Borough of Queens, in the Borough of Brooklyn except the thirtieth and thirty-first wards thereof, and in the Borough of the Bronx, except that portion of it formerly contained in the town of Westchester outside of the villages of Wakefield and Williamsbridge, eighty cents.

2. In the second and fourth wards of the Borough of Queens, and in the thirtieth ward of the Borough of Brooklyn, one dollar.

3. In the third ward of the Borough of Queens, in the thirty-first ward of the Borough of Brooklyn, and in the Borough of Richmond, one dollar and twenty-five cents for the remainder of the year nineteen hundred and six; one dollar and twenty cents during the year nineteen hundred and seven; one dollar and fifteen cents during the year nineteen hundred and eight; one dollar and ten cents during the year nineteen hundred and nine; one dollar and five cents during the year nineteen hundred and ten; and one dollar thereafter.

4. In that portion of the Borough of the Bronx formerly contained in the town of Westchester, outside of the villages of Wakefield and Williamsbridge, one dollar and fifteen cents during the years nineteen hundred and six, nineteen hundred and seven and nineteen hundred and eight; one dollar and ten cents during the year nineteen hundred and nine; one dollar and five cents during the year nineteen hundred and ten; and one dollar thereafter.

SEC. 2. The illuminating gas furnished by any such corporation, association copartnership or person shall have an illuminating power of not less than twenty-two sperm candles of six to a pound, burning at the rate of one hundred and twenty grains of spermaceti per hour tested at a distance of not less than one mile from the distributing holder by a burner consuming five cubic feet of gas per hour and each one hundred cubic feet of gas shall not contain more than five grains of ammonia nor more than twenty grains of sulphur nor more than a trace of sulphuretted hydrogen. The pressure of illuminating gas in any service mains in the said city at any distance from the place of manu-

facture shall not be less than one inch, nor more than two and one-half inches.

SEC. 3. Any corporation, association, copartnership or person violating any provision of this act shall forfeit the sum of one thousand dollars for each offense to the people of the state.

SEC. 4. This act shall not apply to gas furnished or sold to the city of New York.

SEC. 5. Chapter three hundred and eighty-five of the laws of eighteen hundred and ninety-seven, entitled "An act to regulate the price of illuminating gas in cities of fifteen hundred thousand inhabitants", and all other acts or parts of acts inconsistent herewith are hereby repealed.

SEC. 6. This act shall take effect on the first day of May, nineteen hundred and six.

Office Supreme Court, U. S.
FILED
SEP 27 1921
JAMES D. MAHER,
CLERK

Supreme Court of the United States

CHARLES D. NEWTON, as Attorney-General of the State of New York; EDWARD SWANN, as District-Attorney of New York County; and LEWIS NIXON, Constituting the Public Service Commission of the State of New York, for the First District, *Appellants*,

vs.

CONSOLIDATED GAS COMPANY OF NEW YORK,
Respondent.

October Term
1921
No. 257

CHARLES D. NEWTON,
Attorney-General of the State of New York,
Capitol, Albany, N. Y.

WILBER W. CHAMBERS,
Solicitor for Appellant
CHARLES D. NEWTON,
as Attorney-General
Capitol, Albany, N. Y.

Wilber W. Chambers,
Clarence R. Cummings,
John Holley Clark, Jr.,
of Counsel

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1

SUPREME COURT OF THE UNITED STATES

CHARLES D. NEWTON, as Attorney-General of the State of New York; EDWARD SWANN, District Attorney of New York County; and LEWIS NIXON, Constituting the Public Service Commission of the State of New York, for the First District,

Appellants,

against

CONSOLIDATED GAS COMPANY OF NEW YORK.

October Term 1921. No. 257.

2

3

BRIEF ON BEHALF OF APPELLANT

CHARLES D. NEWTON, AS ATTORNEY-GENERAL OF THE STATE OF NEW YORK.

4

This is an appeal by the above named appellants from a decree of the United States District Court, Southern District of New York (Hon. Learned Hand, District Judge, Presiding) entered in the office of the clerk of the said court on August 4, 1920, which decree enjoined and restrained the appellants, public officials of the State of New York, from enforcing the provisions of chapter 125 of the laws of 1906, which fixed the price of gas at 80c, sold in certain portions of the city of New York to private consumers, and from a decree entered in the clerk's

5

6 office of the United States District Court, Southern District of New York, on August 11, 1920 (Pp. 182a–198a), amending the decree of August 4, 1920.

The issues in this case were, by order dated May 16, 1919, made by Hon. Julius M. Mayer, District Judge of the United States, Southern
7 District of New York, referred to Abraham S. Gilbert, Esq., of New York City,

> " to take all of the testimony and evidence respecting the issues herein, make all needed computations and fully find the facts; but nothing herein contained shall be construed as meaning that the Special Master's findings of fact shall be final, but only that he
8 shall find the facts for the purpose of aiding the court and making his recommendations * * *. The master shall report to this court all the testimony and evidence received by him together with his findings of fact and his recommendations as to the facts and the law." (P. 25a.)

9 It will be noted that the master was not finally to determine the facts.

In a suit to enjoin the enforcement of a law as unconstitutional, such as the instant case, the findings of a master are not entitled to the weight usually accorded them in ordinary equity suits, since the validity of the action of a legislative
10 body is involved.

This court will give its own full consideration to the facts as well as the law, regardless of what took place in the courts below.

City of Knoxville v. *Knoxville Water Co.*, 212 U. S. 1.

The Court below recognized that this was the 11
rule, for he said " in these cases the conclusiveness of the master's report does not obtain." (P. 171a.)

And again in the supplemental opinion,

> " In the case at bar the reference was not on consent — though without objection — and it was only advisory in any case. In 12
> such cases ' the report has no legal sanction and no further weight than such as attaches to it by reason of the fact that it may embody the researches and conclusions of an intelligent master.' " (P. 191a.)

The trial of the case began on the 15th day of July, 1919, and continued almost day by day until 13
the 30th day of March, 1920. The record before the master consists of more than 16,000 pages of testimony and approximately 1,000 exhibits, and as now made up in this Court, consists of 21 volumes, comprising 19,849 printed pages.

The trial continued practically every day, through the summer months of 1919, and the 14
hours were long and exhausting. Scarcely any adjournments were had and the trial sometimes proceeded on Saturdays, holidays and evenings.

THE ISSUES IN THE CASE.

The action was brought to have declared unconstitutional and void chapter 125 of the Laws of 15
1906, upon the ground that said statute was in contravention of section 10, Article I, of the Constitution of the United Sates and the Fourteenth Amendment thereof.

The particular reason why respondent sought to break down the statute was set forth in para-

graph XVI of its bill of complaint in the following words:

> "The said rate of eighty cents per thousand cubic feet has, during the past year (1918), practically deprived your orator of any return whatever upon the reasonable value of its property devoted to the manufacture and distribution of gas * * * and at no time since the said rate went into effect, has it permitted your orator to earn a fair return thereon * * * in that it impairs the obligation of your orator's contract with the State of New York * * * in that it deprives your orator of its property without due process of law and denies to it the equal protection of the laws." (P. 6a.)

It will be noted from the quotation above given that respondent claims in its bill of complaint, which was never amended, that the statute was confiscatory from its inception, to wit: July 1, 1906.

The prayer in the bill of complaint asks the Court to declare said statute illegal and void and that the appellants be restrained from in any way enforcing or attempting to enforce its provisions. (P. 8a.)

The answer of the Attorney-General denied all of the material allegations of the bill of complaint and alleged affirmatively that the rate or rates provided for in said chapter 125 of the Laws of 1906, were reasonable and not confiscatory and did not deprive respondent of its property without due process of law, and did not deny it the equal protection of the law, and that said act was not in violation of said section 10, Article I, of the Constitution of the United States and of the

Fourteenth Amendment of the United States, and that the price fixed by said chapter gave respondent a fair and reasonable return on its capital invested in the gas business. (P. 10a.)

The answer of the District Attorney of New York county was substantially the same as that of the Attorney-General with the further allegation that respondent had not furnished to its consumers continuously gas of a candle power having the standard of illumination of 22 candles provided by the statute. (P. 21a.)

The answer of the defendant Public Service Commission of the State of New York, First District, was substantially the same as that of the Attorney-General and the District Attorney of New York county, with the further allegation that respondent persistently and knowingly failed to supply its consumers with gas of the quality prescribed by statute. (Pp. 15a–21a, Vol. I.)

It should be noted that the usual allegation in a bill of complaint of this kind that the respondent had at all times complied in all respects with the statute complained of, is lacking. Whether this was through oversight or by design it does not appear.

The appellants claimed throughout the case that this was a fatal defect. (See motion to dismiss bill of complaint on opening, pp. 31, 39; motion to dismiss at the close of respondent's case, pp. 89, 96; motion to dismiss at the close of the whole case, p. 15459.)

The appellants excepted to all of the master's findings with the exception of findings 2, 12, 13, 14, 15, 25, 26, 29, 40, 41, 48, 66 and 75. (Pp. 70a

26 to 131a.), and to his opinion made a part of his findings. (Pp. 100a to 131a.)

Respondent filed no exceptions to the report or opinion of the master.

PRIOR SUIT.

This is the second action brought by respondent
27 to have declared unconstitutional said chapter 125 of the Laws of 1906.

On May 1, 1906, it filed a bill in the United States Circuit Court for the Southern District of New York against the Attorney-General of the State of New York and others, to enjoin the enforcement of said Act of the Legislature. That
28 suit was tried before a master who reported in its favor. The case later was argued before the Circuit Court and a final decree entered restraining defendants from enforcing the provisions of the Act in question.

Consolidated Gas Company v. *Willcox*, 157 Fed. Reporter, 849.

29

The defendants appealed directly to this Court from the decree of the Circuit Court where the decree was reversed and the bill dismissed.

Willcox v. *Consolidated Gas Company*, 212 U. S. 19.

By the words of the complaint above noted and
30 by the course of the trial this action therefore is in effect a retrial of, or at least a continuation of the former suit, at least that was the intention of the pleader, and the theory of its trial counsel.

As further evidence that it was intended by respondent that this should be a continuation of

the prior suit, there will be found various references to that suit in the bill of complaint. In paragraph VI (p. 29) is a reference to the bringing of the prior suit. In paragraph VII (p. 3a) it is alleged that said cause was tried and a decree entered. In paragraph IX (p. 3a) reference is made to the appeal to this Court in the prior suit and the proceedings had thereon, and in paragraph XII (p. 4a) the allegation is made of the alleged finding in the prior suit of the value of respondent's property devoted to its gas business on December 31, 1905.

In the prior suit referred to respondent made the same claim there which it makes in the instant case, viz: that the 80-cent rate provided by the statute was so low as to amount to confiscation, and that it was not able to make and sell gas for 80 cents so as to give it a fair return upon its property invested in the gas business.

Later on in this brief we make further reference to the prior suit, and the opinion written by Mr. Justice Peckham on behalf of this Court.

Respondent was formed in 1884 by the consolidation of six of the seven companies then doing business in the city of New York. The gas companies merged were as follows:

New York Gas Light Company, incorporated in 1823.

Manhattan Gas Light Company, incorporated in 1830.

Metropolitan Gas Light Company, incorporated in 1855.

Harlem Gas Light Company, incorporated in 1855.

Municipal Gas Light Company, incorporated in 1874.

Knickerbocker Gas Light Company, incorporated in 1876.

(Senate Document 47, 1886, Complainant's Ex. 398, p. 16898; Defendants' Ex. AA46, p. 17706.)

Since its organization in 1884 respondent has increased its capital stock from time to time. It has acquired the stocks and securities of other gas and electric companies in the city of New York so that at the time of the trial it owned all of the stock of the Astoria Light, Heat & Power Company, substantially all of the stock of the New Amsterdam Gas Company, the Standard Gas Light Company, the New York Edison Company, the United Electric Light & Power Company and a majority of the stock of the New York Mutual Gas Light Company. The New Amsterdam Gas Company, of which it owned substantially all of the stock above stated, owned in turn all of the stock of the East River Gas Company, the Central Union Gas Company and the Northern Union Gas Company, so that in this indirect way respondent likewise owns the three last mentioned companies. (P. 29a; Master's finding 12, p. 29, not excepted to.)

Respondent also owns all the gas and electric companies in Westchester county and some of the gas and electric companies in Queens county.

The master said in his opinion, and respondent is not in a position to dispute the statement, that it "has a monopoly of the gas and electric business in the Borough of Manhattan, City of New

York," (p. 47a), and he could have added truthfully that it has a like monopoly in Westchester county and certain portions of Queens county. 41

Of the plants which came into the possession of respondent, in 1884, only four remain, viz: the 14th and 42d street plants, where some coal gas was in prior years manufactured; and the 21st and 99th street plants, where water gas is presently manufactured. The gas not made in these plants is purchased from respondent's subsidiaries, the Astoria Light, Heat & Power Company, the New Amsterdam, Standard and New York Mutual. 42

The defendants in the prior suit contended, and the appellants here contend, that the 14th and 42d street plants are old, wornout and dilapidated and ought not to be considered as used and useful in the manufacture of gas. The District Court upheld this contention. (P. 173a.) 43

The respondent sold in 1918, approximately 18,000,000,000 cubic feet of gas. Of this amount so sold only 8,013,769,000 cubic feet was made in its own plants (Defendants' Exs. AA-244 and AA-122, pp. 18071, 18239). The balance of the gas not manufactured by respondent at its own plant and so sold in 1918, was obtained as we have stated from the New York Mutual Gas Company, the New Amsterdam and the Astoria Light, Heat & Power Company (Defendants' Ex. AA-404, p. 18704). 44 45

The New Amsterdam Gas Company has a manufacturing plant at Ravenswood, Long Island, and brings its gas over to Manhattan by way of a tunnel, which was built and is owned by the East River Gas Company of Long Island,

46 although all of the stock of that company is owned by the New Amsterdam Gas Company, and the stock of the latter company, as we have stated, is in turn owned by respondent.

There was no evidence produced by respondent upon the trial as to the cost of manufacturing gas at the New Amsterdam Gas Company's plant
47 in Ravenswood, and the record is entirely barren upon that phase of the case.

The New York Mutual Gas Company makes its own gas on Manhattan Island and the record does not show how much it cost that company to make the gas which it sold to respondent's company.

The Astoria Light, Heat & Power Company,
48 the third company which furnishes gas to respondent, makes its own gas on Long Island and, like the New Amsterdam Gas Company, brings it over by way of what is known as the Astoria Tunnel, which tunnel is also owned by the East River Gas Company and the Ravenswood tunnel.

49 Respondent offered no competent evidence as to the cost or value of either of these tunnels, nor any evidence as to how much money is necessary to maintain same.

The gas served by respondent and the affiliated companies in Manhattan and The Bronx to its consumers, is intermingled promiscuously; that is to say, each of the companies making gas con-
50 tributes in common so that the gas at any given point cannot be identified and may come from any one of the manufacturing plants of the respondent or the affiliated companies, or it may be a mixture of all the gas made at all of the different plants. (Pp. 4751–4752, fols. 14252–14253, 14256.)

As Mr. Woods, a witness called by respondent admitted in order to determine many of the questions involved here, you have got to examine the books of the various companies in the system as well as respondent's. (Pp. 4752–4753, fol. 14257.) 51

The system of supplying all of the different holders of the Consolidated Gas Company and its subsidiaries, called the transfer system, consists of mains and tunnels in the Boroughs of Manhattan, Bronx and Queens, such as the Ravenswood Tunnel, the westerly end of which is at 17th street and East River and the easterly end at the New Amsterdam plant on Webster avenue and the East River, Long Island City, and the Astoria Tunnel, the easterly end of which is at the Astoria plant in Long Island City, and the westerly end at 133rd street and East River in The Bronx. The two tunnels and plants are connected on Long Island side by a 60-inch main and a 48-inch main. There are mains in these tunnels at 71st street and the East River connected with a 48-inch main in Manhattan, which runs south as far as 63rd street. This main also runs in a northerly direction connected with the 99th street plant and with the 111th street holder station of the works of the Standard Gas Light Co., and at the 115th street plant crosses the Harlem River where it is connected with the Standard company's main and with the Harlem River; then in an easterly direction to the Ravenswood Tunnel at 132d street and East River. From that point there is another main that extends in a northwesterly direction to the Kingsbridge holder, connected with the Northern Union holder on Webster avenue and the Freemont holder of the Central 52 53 54 55

Union Gas Company which was put in to deliver gas for the use of the Northern Union Gas Company and the Central Union Gas Company, and from that point a transfer main runs in a southerly direction, crosses the Harlem River connected with 132d street holder on the west side and then extends southerly and connects with all the works and holder stations on the west side of the city; that is the 65th street, 55th street, 44th street and 42d street, and extends further in a southerly direction as far as 18th street. At that point it crosses to the easterly side of the city, connects with the New York Mutual plant at 12th street, 14th street works and 21st street works, and then runs in a northerly direction to 63rd street and connects with the 48-inch main above mentioned.

All the plant and holder stations in the Consolidated system of The Bronx, Long Island City and Manhattan are connected with this general transfer system which forms a loop around the entire territory in Manhattan and The Bronx with its crosstown sections; 18th street and 65th street crossing along the park, another crossing at 111th street and again at 132d street. The transfer system delivers gas into the various holders and from that point it is delivered into the distributing mains which are inter-connected at various points. As the gas is made at the plant it is delivered *either into distributing holders at the particular station or into the transfer system, or both.*

A particular manufacturing plant may be putting gas into its own holder and at the same time deliver part of its production into the trans-

fer system. There is no regulation about the distribution of gas, except by the pressure; no one knows in what direction it will flow. If the pressure at any given point is reduced by heavy consumption the gas flows in that direction. When the demand ceases the direction of the flow changes. 61

The facts will be discussed under the various points. 62

We shall ask the court to reverse the judgment and dismiss the bill of complaint upon the following grounds:

1. Appellants were not accorded a fair trial.

2. Respondent enjoyed enormous profits from the inception of the statute in question up to the end of 1917. Such return over 6 per cent on the fair value of respondent's property amounts to over $24,000,000. 63

3. Respondent earned in the year of 1918 and the first eight months of 1919, the results of which were the basis of the determination of the court below, more than a fair return. The net earnings, we contend, amounted to, in 1918, more than 15.46 per cent, and in 1919, more than 12.99 per cent. 64

4. The court below erred in not taking the proper period. It was error for the master to base his decision on the abnormal year of 1918 and the first ten months of 1919 only, and error for the District Court to take into consideration only the year of 1918, the first eight months of 1919 and to this add eleven months of 1920, for which no evidence was presented. The proper period should have been that selected by the 65

66 respondent in its bill of complaint, viz: 1906–1918, inclusive.

5. The statute should not be declared confiscatory until the contingency fund, amounting to $11,801,659.48 is exhausted, for this fund was built up from operating revenues in prior years and was created to take care of temporary losses due to abnormal conditions such as the
67 company encountered in the years of 1918 and 1919.

6. It was error for the court not to have dismissed the bill of complaint, for it appears that the respondent has made an average return of more than 6 per cent.

68 7. It was error for the master and the court below to allow anything for franchises and the valuation of franchises should be excluded from the property upon which respondent is entitled to a return.

8. The master and the court below committed error, in including in the rate base various property not used and useful in making and distribu-
69 ting gas.

9. The 57th street office building was not an adequate improvement upon the land upon which it was erected and should not be included in the rate base.

10. The master and the court below erred in holding that they were bound to accept the book
70 entries in respondent's books at the time of the consolidation in 1884 as the starting point from which to obtain the fair value of the property upon which a fair return is to be computed.

11. The master and the court below erred in failing to follow the rule laid down by this court

in determining the value of respondent's property, particularly in failing to deduct depreciation. 71

12. The court below should have found that the fair value of respondent's property upon which it is entitled to a fair return does not exceed, for 1918, if founded upon cost, $27,178,375, and if founded upon the assessed value of land 72 and actual cost of tangible and intangible property, the sum of $34,180,966.

13. It was error for the court below to make an allowance for working capital in excess of $1,300,000.

14. This case could not be justly determined until the court ascertained the amount of 73 respondent's unliquidated claim against the United States government growing out of the extraction by the Government of light oils from gas made by respondent in 1918.

15. The master erred in refusing to admit testimony showing respondent violated the statute in question as to quality of gas furnished prior 74 to 1916, and committed other errors in regard to the admission and exclusion of evidence relating to the quality of gas furnished subsequent to that date. The evidence which was allowed in on quality of gas furnished showed repeated violations sufficient, we submit, to require a dismissal of the bill of complaint. 75

16. It was reversible error to admit respondent's books in evidence.

17. The master erred repeatedly in the admission and exclusion of evidence, which errors were not corrected in the court below.

76

POINT I.

The Appellants Respectfully Submit That They Have Not Had Their Day in Court Such as is Guaranteed Them by the Constitution of the United States, and For This Reason the Case Should be Reversed and Remanded to the Lower Court For a New Trial.

77 Chapter 125 of the Laws of 1906 has been held by this court to be constitutional.

Willcox v. *Consolidated Gas Co.*, 212 U. S. 19.

The burden of proof in any case is on the party assailing the statute to show beyond a reasonable doubt its unconstitutionality.

78 This rule is now settled by an abundance of authority.

Willcox v. *Consolidated Gas Co.*, (*supra*).

Re Sinking Fund Cases, 99 U. S. 700, p. 718.

79 *City of Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1, p. 8.

Minnesota Rate Cases, 230 U. S. 352, p. 452.

Des Moines Gas Co. v. *Des Moines*, 238 U. S. 153, p. 163.

San Diego Land and Town Co. v. *National City*, 174 U. S. 739, 754.

80

A brief reference to the case of *Willcox* v. *Consolidated Gas Co.* (*supra*) states the rule clearly in the following words written by Mr. Justice Peckham, for the court (p. 41):

"* * * *The case must be a clear one* 81
before the courts ought to be asked to interfere with state legislation upon the subject of rates * * *."

And again at page 54:

"Upon a careful consideration of the case before us, we are of the opinion that the complainant has failed to sustain the burden cast 82
upon it of *showing beyond any just or fair doubt* that the acts of the legislature of the State of New York are in fact confiscatory."

In the *Sinking Fund Cases* (*supra*) this court said:

"Every possible presumption is in favor of the validity of the statute, and this continues until the contrary is shown beyond a 83
rational doubt" (p. 718).

The presumption to which reference has been made is always in force, regardless of whether the courts have passed upon the validity of the statute, but here not only does this presumption exist but this court has said in its decision in the prior 84
case that the very statute assailed is valid. Consequently, respondent had more than an ordinary presumption to overcome.

Appellants at the close of the case, asked the master to declare a mistrial and the proceedings before him a nullity. The motion made was as follows:

85

"Fourteenth: The defendants say respectfully that they have not had their day in court, such as they feel the Constitution of the United States guarantees them, we mention a few instances to illustrate: Common law proof has been dispensed with, as in the case of the books of the complainant;

86 the right to be confronted with witnesses and the right to cross examine them has been denied; cross examination of witnesses called has been curtailed, limited and, in some instances, stopped completely; the burden of proof has been erroneously shifted from the complainant to the defendants" (p. 8998, fol. 26992).

87 The above request was again renewed at the close of the whole case (p. 15459).

It is difficult by written word or in even an oral argument to paint to a reviewing court an adequate picture of the master in this case, or a picture which would give even a faint indica-
88 tion of what appellants contend was his disregard of their rights; his abrupt and peremptory methods in cutting off cross-examination of respondent's witnesses by the appellants; his apparent prejudicial mind which formed hasty and ill-founded conclusions, all to the detriment of the appellants, and his general failure to
89 maintain not alone that judicial calm which is necessary for the trial of such an involved case, but an open mind or an attitude which would give to the representatives of the people the rights to which they were entitled.

So by the following remarks made by the master during the trial and a part of the record here we
90 call the court's attention to the fact that appellants feel that he did not and could not have approached the question of the validity of the statute with that degree of solemnity and with that degree of reverence that is incumbent upon courts of justice.

The master said on many occasions that he cared nothing for precedents. To use his own language: 91

> "I do not care about rules; I do not care about precedents" (p. 2048).

Again:

> "The Master: I wouldn't care if it was allowed by every judge in the United States I would not allow it" (p. 2032, fol. 6095). 92

And again:

> "I have the least respect for authority perhaps of any man in town" (p. 2032, fol. 6096).

And from other statements that he made during the trial it was plain this was the feeling which he entertained throughout (pp. 2032, 3053, 10862, fols. 6095, 9159, 32886). 93

And again:

> "Mr. O'Brien: Well, the courts have held against such things.
>
> The Master: Well, they have ruled wrong. The trouble is that in too many cases the courts do not understand business, have not had business experience. 94
>
> Mr. O'Brien: You are talking seditiously now.
>
> The Master: No; I say that any court that has had to with business problems knows better.
>
> * * * * * * * 95
>
> The Master: That is one trouble with our bench, we have too few men who have had actual experience with business affairs.
>
> Mr. Chambers: Well, we have gotten along pretty well from Washington down.
>
> The Master: No; we haven't gotten along

96 pretty well. It has been a scandal in this community for years, the kind of judges we have had. I am saying that so the stenographer should take it down.

Mr. O'Brien: You don't want the stenographer to take that down.

The Master: The stenogapher is taking it down. It is something that I have repeated
97 over and over again" (p. 6355, fols. 19063-19065).

Indeed he even went so far as to speak disparagingly of this exalted bench in relation to its decision on the former trial of this action. He said:

"The Master: I get so impatient with
98 courts, high and low.

Mr. Ransom: We all share that view sometimes.

The Master: Including the United States Supreme Court, although I have not got that with me now. When I read as I do the decision in this very gas case, where they say it is the value of the property at the time
99 you fix the rate that must be taken. At any rate, that is the general rule. If the property has so largely increased in value that the return would be unfair, then we have got to make another rule. What is the other rule?

Mr. Ransom: They do not say.

The Master: That kind of a decision is
100 wrong, and I have no respect for a decision of any court which leaves the situation in that shape. Now, let us go ahead" (p. 10962).

And again; showing that the master did not really place the burden upon respondent here but reversed the universal rule and placed the

burden upon the appellants. We have reasons 101
which the master gave for admitting in evidence the general books of account of respondent when he said:

"The Master: Let me give you another thought that runs through my mind in trying to reach a conclusion, Mr. Chambers. If I leave these books in evidence, and I am in 102
error in doing that, and Judge Ransom proceeds to complete his case, and the findings, we will assume, are in his favor — because that is the only way that you might deal with that — and suppose you are right in your contention, and the case goes up to the United States Supreme Court, they will say the Master is just plumb crazy, they are 103
sorry for him, he did not know what he was doing, a perfectly innocent fool.

Mr. Chambers: I would not put it just that way.

The Master: I am putting it at its worst. And suppose they strike it from the record. Judge Ransom is pretty badly injured, isn't he? He has gone through with this case, and he has no record; isn't that right? 104

Mr. Chambers: Yes.

The Master: If I refuse to take them, and I put him to the necessity of bringing all these people and all these records, and we spend three months on that branch of the case, and Judge Ransom is right in his statement that his client is losing many thousands of dollars a day; I am doing him a pretty 105
serious injury if I am wrong in that ruling. Isn't it my duty as a Master to support Judge Ransom, and let him suffer if he has led me into an error?

Mr. Chambers: No" (pp. 1838-1839, fols. 5514–5517).

Apparently, the Master, as is shown by the above quotation, was led into admitting the books in evidence because he was told by counsel that respondent was losing money, although there was no evidence to that effect.

Against the earnest protest of the appellants that it was error to admit the books, the Master nevertheless, as appellants contend, departed from all precedents and abandoned the laws of evidence. He admitted himself that he had dispensed with common law proof. He said:

> "Instead of holding you to common law proof, I have gone way the other way, and I have gone to the extreme, I think, of relieving you from common law proof. We would be trying this case for six years if I confined you to common law proof. * * *
>
> Mr. Chambers: I respectfully say that your Honor has gone so far outside of common proof that you will endanger any judgment that the complainant may get" (p. 2740, fols. 8219-8220).

Previously, the Master had acknowledged that the rule in rate cases was no different from the rule in any other case (p. 1707, fol. 5120).

Another indication of the master's attitude towards the legislation in controversy here and his absolute want of reverence for this statute which had been held valid in the prior suit by this court, which was the will of the people and deserved and by all legal rules should have, from the judicial branch of the government, the highest respect, we call the court's attention to certain of his remarks in regard to that portion of the statute which prescribes the lighting standard of 22 candle power, evidently placed in the statute for the protection of the people.

He said of this statute: 111

> "It just illustrates some of the stupid things the legislature does" (p. 11985, fol. 35955).

And again:

> "The trouble is we are dealing with a fool statute" (p. 13028, fol. 39083).

The failure on the part of the master to accord 112
the appellants a fair trial was argued before the learned District Court. Yet the District Court makes no mention of it in its opinion with the single exception that it did say:

> "* * * the master peremptorily shut off any inquiry in the case of superannuation. * * * and in this he was in error" 113
> (p. 165a).

The learned court then excuses the error, stating:

> "I cannot see that the cross-examination which the master stopped could have added anything of substance" (p. 165a).

We respectfully urge that such peremptory 114
and arbitrary erroneous rulings by the master cannot properly be excused. Where as here the entire course of the trial was marked by similar and more aggravated cases of arbitrary denial of the right of cross-examination as we shall show it was reversible error upon the part of the court to fail to send the case back for a new 115
trial, or take the evidence itself. Where cross-examination is erroneously cut off it lies neither within the province nor within the ability of the court to say where the cross-examination would have led to or what it would have developed. It was error as the court said and appellants'

116 rights cannot be protected unless the error be cured by a retrial or a dismissal of the bill of complaint.

Although the master's attention was repeatedly called to Equity Rule 46, which provides that

117 "When evidence is offered and excluded and the party against whom the ruling is made excepts thereto at the time, the court shall take and report so much thereof, or make such a statement respecting it as will clearly show the character of the evidence, the form in which it was offered, the objection made, the ruling, and the exception,"

118 he paid no attention to its requirements (pp. 11056–11057, 12834–12835).

We have pointed out elsewhere that all objections carried with them exceptions whether or not an exception was taken (pp. 2275–2276).

His excuse for completely disregarding it was stated by him:

119 "If I am wrong in my theory of this case, the Appellate Court will have to send it back to some other master" (p. 11057).

This question was raised in the assignment of errors (pp. 202a–204a).

For the sake of convenience we shall divide this point into the following sub-headings:

120 *First:* THE MASTER REPEATEDLY SUSTAINED OBJECTIONS TO IMPORTANT AND MATERIAL QUESTIONS ASKED BY THE APPELLANTS UPON DIRECT AND CROSS EXAMINATION WHEN NO OBJECTION WAS MADE BY RESPONDENT'S COUNSEL.

Literally hundreds of instances of this erroneous practice occur in the trial of this case. A

large number of them we recite in a foot-note below. [121]

Pages 775, 783, 784, 787, 794, 795, 799, 844, 857, 858, 863, 873, 875, 878, 879, 882, 890, 894, 904, 925, 980, 991, 997, 1002, 1003, 1004, 1011, 1012, 1024, 1025, 1028, 1029, 1031, 1054, 1055, 1057, 1058, 1059, 1060, 1095, 1113, 1126, 1133, 1134, 1135, 1136, 1140, 1142, 1147, 1154, 1155, 1293, 1333, 1634, 1635, 1679, 1680, 1941, 1948, 2262, 2265, 2266, 2274, 2275, 2325, 2326, 2346, 2498, 2583, 2593, 2597, 2599, 2601, 2602, 2946, 2951, 2952, 2953, 2977, 2978, 2980, 2982, 3464, 3468, 3484, 3492, 3493, 3539, 3553, 3555, [122] 3630, 3640, 3679, 3698 3699, 3716, 3721, 3730, 3739, 3740, 3741, 3742, 3744, 3745, 3748, 3749, 3750, 3965, 4072, 4111, 4159, 4184, 4203, 4204, 4207, 4208, 4210, 4211, 4212, 4215, 4286, 4288, 4317, 4322, 4330, 4384, 4385, 4409, 4423, 4436, 4446, 4449, 4450, 4452, 4455, 4461, 4463, 4470, 4471, 4472, 4477, 4478, 4479, 4482, 4483, 4488, 4489, 4490, 4491, 4492, 4493, 4494, 4497, 4536, 4537, 4538, 4539, 4540, 4596, 4597, 4603, 4608, 4609, 4610, 4732, 4736, 5002, 5006, 5053, 5054, 5096, 5106, 5123, 5124, 5128, 5141, 5215, 5316, 5301, 5339, 5455, 5462, 5467, 5468, 5546, 5547, 5550, 5564, 5613, 5614, 5724, 5725, 5754, 5775, 5779, 5816, 5826, 5830, 5831, 5832, 5835, 5836, 5838, 5540, 5856, 5869, 5912, 5927, 5928, 5956, 5963, 5965, 5967, 5971, 5975, 5977, 5980, 5987, 5996, 5999, 6000, 6001, [123] 6011, 6016, 6021, 6026, 6032, 6035, 6036, 6043, 6045, 6048, 6053, 6054, 6057, 6058, 6059, 6060, 6061, 6067, 6074, 6081, 6082, 6083, 6090, 6098, 6102, 6104, 6105, 6108, 6109, 6111, 6112, 6113, 6114, 6116, 6117, 6128, 6134, 6135, 6136, 6141, 6142, 6143, 6144, 6145, 6241, 6262, 6263, 6265, 6266, 6277, 6283, 6284, 6287, 6288, 6298, 6299, 6301, 6305, 6308, 6309, 6310, 6311, 6325, 6328, 6329, 6330, 6331, 6332, 6333, 6352, 6353, 6356, 6361, 6362, 6363, 6364, 6365, 6368, 6369, 6378, 6383, 6384, 6386, 6395, 6396, 6397, 6398, 6399, 6400, 6401, 6403, 6404, 6408, 6409, 6410, 6412, 6413, 6414, 6428, 6430, 6455, 6511, 6512, 6521, 6532, 6533, 6540, 6570, 6572, 6595, 6596, 6602, 6609, 6612, 6617, 6618, 6620, 6624, 6625, 6627, 6636, 6647, 6653, 6654, 6655, 6658, 6663, 6666, 6667, 6668, 6669, 6714, [124] 6717, 6718, 6720, 6726, 6735, 6736, 6737, 6738, 6743, 6744, 6756, 6763, 6767, 6769, 6778, 6802, 6811, 6822, 6825, 6826, 6835, 6842, 6844, 6845, 6851, 6855, 6859, 6864, 6865, 6866, 6868, 6869, 6870, 6871, 6872, 6874, 6875, 6877, 6878, 6886, 6887, 6889, 7367, 7372, 7387, 7388, 7392, 7394, 7400, 7413, 7427, 7428, 7433, 7434, 7474, 7475, 7476, 7488, 7489, 7490, 7571, 7573, 7574, 7575, 7577, 7579, 7580, 7582, 7583, 7584, 7669, 7683, 7705, 7708, 7741, 7754, 7762, 7763, 7764, 7769, 7770, 7788, 7791, 7792, 7793, 7863, 7924, 7929, 7941, 7967, 7973, 7974, 7975, 7976, 7978, 8000, 8001, 8004, 8005, 8036, 8037, 8038, 8039, 8040, 8053, 8056, 8057, 8059, 8182, 8186, 8196, 8199, 8201, 8207, 8220, 8221, 8222, 8225, 8226, 8227, 8240, [125] 8245, 8249, 8251, 8253, 8255, 8274, 8280, 8281, 8282, 8283, 8284, 8286, 8287, 8288, 8289, 8290, 8291, 8292, 8293, 8297, 8298, 8299, 8300, 8301, 8302, 8304, 8305, 8306, 8307, 8311, 8314, 8315, 8480, 8481, 8513, 8514, 8560, 8562, 8563, 8574, 8581, 8582, 8586, 8596, 8597, 8598, 8599, 8600, 8601, 8612, 8629, 8630, 8633, 8634, 8635, 8636, 8637, 8642, 8643, 8644, 8650, 8662, 8668, 8669, 8674, 8685, 8687, 8689, 8719, 8734, 8735, 8841, 8842, 8844, 8848, 8853, 9901, 9917, 9920, 10708, 10713, 10714, 10715, 10716, 10717, 10718, 10719, 10727, 10728, 10729, 10730, 10731, 10734, 10745, 10887, 10888, 10889, 10955, 12086, 12090, 12844, 12889, 13036, 13133, 13134, 13135, 13136, 13143, 13158, 13170, 13230, 13233, 13305, 13535, 14376.

126 We contend that in every instance where the master sustained an objection on his own initiative when none was made by respondents or refused to allow witnesses to answer questions when no objection was made, he committed error prejudicial to the appellants.

A few instances which will give, perhaps, an
127 idea of the unfair attitude of the master towards the appellants throughout the trial we cite as follows:

The first witness, H. W. Alrich, called by respondent for the purpose of giving evidence concerning the property which respondent claims to be used and useful and the structures and
128 location of same thereon, was under cross-examination by appellants' counsel. The following occurred:

"Q. Could you say what gas had been made in the 14th Street and 42d Street plants in the years 1916, 1917 and 1918?

The Master: That question is ruled out.

129 Mr. O'Brien: Exception.

Mr. Chambers: I know your Honor, but there was no objection.

The Master: I am objecting to it. I think the Judge or Referee who sits there like a graven image and does not use his brain does not take the proper position. I am running this case.

130 Mr. Chambers: I know, but your Honor may not know what is back of our inquiry.

The Master: I know what the line is" (p. 775, fols. 2324–2325).

We have discussed quite fully under another point that the books of the company were improperly admitted in evidence, because among

other things, they were not properly authenti- 131
cated, and were not books of original entry.

The Master in reporting to this Court his findings has relied largely upon respondent's books to sustain his findings. It can be seen, therefore, that the books are the most important, if not the *only* evidence in the case to sustain the Master's findings, and how important was the cross- 132
examination of Mr. Brundage, the only witness called by the respondent to authenticate them in any way.

He was head of the accounting department of the respondent company, and while upon the stand under cross-examination the appellants were endeavoring to obtain some information in 133
regard to how respondent's books were made up, whether they were reliable and accurate, and whether they correctly reflected the conditions under which respondent was operating.

This witness was asked:

> "Q. Now, repairs to buildings. You carry an account, or did you, for that? A. We did, 134
> yes. * * * We carried an account for Repairs to buildings and all of the various plants of the company.
>
> Q. Does that include any of the buildings of the allied companies?" (p. 5725, fols. 17174–17175),

to which question the Master sustained an objection and made this ruling: 135

> The Master: My ruling is that you and your experts ought to know where he gets his basis, and before these books were put in evidence he was fully cross-examined as to where the entries came from, and where the

136 supporting data was to be found. I won't allow any further questions.

Mr. Chambers: Then I will have to sit down.

The Master: I will be glad to see you sit down.

Mr. Chambers: If you won't allow a question of any kind?

137 The Master: Not the kind you have been asking, I won't " (pp. 5726-5727, fols. 17178, 17179).

And again:

" What information do you get in order to make this entry, from the Standard?

The Master: Objection sustained.

138 Mr. Chambers: Exception.

Q. What information do you have upon which you make the entry of these expenses in the books?

The Master: Objection sustained.

Mr. Chambers: Exception " (p. 6116, fols. 18346-18347).

And again:

139 " Q. Your department does the bookkeeping for the other companies as to that?

The Master: Objection sustained. It is sufficiently covered.

Mr. Chambers: We have not covered that specifically.

The Master: I think it is sufficiently covered.

140 Mr. Chambers: Exception " (p. 6117, fol. 18349).

And again:

" Q. And how would some one examining this account find out what it was for? Could he find out from any information contained in either the operating ledger or this?

The Master: Objection sustained. 141
Mr. Chambers: But we cannot.
The Master: You have that in the record.
Mr. Chambers: You are going to say, 'Why didn't you examine this?' All we know is that they made a charge" (p. 6125, fol. 18373).

And again:

142
"Q. Now, under this same promotion expenses — we find an entry in this sundry debtors blotter which reads, in speaking of a charge against the Standard, 'For commissions paid salesmen of the Consolidated Gas Company for appliance orders obtained by them and executed by you,' and running to the Standard Company, of over a thousand 143 dollars. Now, what is that?
The Master: Objection sustained.
Q. Well, where will the information about that be found?
The Master: Objection sustained.
Mr. Chambers: How are we going to check that, if the Master please?
The Master: I decline to discuss my 144 ruling.
Q. You keep the books of those salesmen who sell appliances for the other companies?
The Master: Objection sustained.
Mr. Chambers: Exception" (p. 6133, fols. 18397–18398).

And again:

145
"Q. You keep the books and render them bills?
The Master: Objection sustained.
Mr. Chambers: I don't see why your Honor objects to me showing that he keeps the books.

146 The Master: Because it is twenty minutes of five, and it is apparent from the books themselves that he keeps the books.

* * *

The Master: Perfectly stupid. Of course, he keeps a record, whether it is called a book or something else, upon which they make a charge.

147 Mr. Chambers: Just for that month it is $10,000" (p. 6134, fols. 18401–18402).

And again:

"Q. What is the charge of $100 to the Proudfoot Commercial Agency?

The Master: Objection sustained.

148 Mr. Chambers: I have not finished my question.

The Master: I don't care" (p. 6142, fol. 18426).

And again:

"Q. You have one here, Farmers' Loan & Trust Company, $2,000, for services registering stock. What stock is that?

The Master: Objection sustained.

149 Mr. Chambers: How are we going to know what stock it is? I can't possibly see how we can determine this case without some light on that.

The Master: Objection sustained" (p. 6143, fol. 18427).

150 Witness Woods was respondent's chief engineer and was an important witness for the company. He testified to certain hypothetical figures relating to the cost of making and distributing gas with a plant of 10,000,000 cubic feet daily capacity. He claimed to be familiar with the various holders and manufacturing plants of respondent and its allied companies.

The question of the distributing system was of 151
vast importance as an issue in the case, and while Mr. Woods was undergoing cross-examination he was asked:

"Q. Did you consider the locating of a holder at Inwood at the time you were deliberating as to locating of a holder as Sedgwick Avenue and Fordham Road?

Mr. Ransom: I object to that as immaterial and incompetent." 152

Objection overruled.

"A. I think — I do not think that was considered at all. We did not believe it was an appropriate place to build the holder.

Q. Why?

The Master: Objection sustained.

Mr. Ransom: I think that should be answered. I think he should explain why. 153

The Master: Well, I don't. I am familiar with lots of locations. I don't want to hear anything further about this.

Mr. O'Brien: Counsel wants the question answered.

The Master: I don't care what counsel wants" (pp. 5140–5141, fols. 15420–15421). 154

Here the master not only sustained an objection when none was made, but he refused to allow respondent's witness Woods to answer the question put on cross-examination, even though counsel for respondent desired to have an answer. 155

Second: THE MASTER EVEN WENT SO FAR AS ABSOLUTELY TO CUT OFF CROSS-EXAMINATION OF WITNESSES, AND SUMMARILY ORDERED THEM FROM THE STAND BEFORE CROSS-EXAMINATION WAS COMPLETED.

We have already given some quotations which substantiate this error.

156 For further substantiation we cite some additional instances:

Mr. Teele, a paid accountant, was called as a witness to testify concerning tabulations he made from respondent's books. He said he had no personal knowledge whatever of the gas business or the transactions of the respondent company.
157 He was merely there to tabulate whatever he found in the books. His tabulations having been copied from the books, were subject to the same infirmities as the books, and since the books, we contend, were improperly admitted, so also were Mr. Teele's tabulations. However, the Master admitted the tabulations in evidence over
158 the appellants' objection and exception. While Mr. Teele was undergoing cross-examination concerning such tabulations the following took place:

> Q. You cannot say that Mr. Gawtry and the other employees devoted their entire time to the cost of production and distribution of the Consolidated Gas Company of gas for
> 159 this year, can you? A. I cannot. Whatever the company paid them for their services, their services are chargeable to the cost of distribution, or to the cost of the operation.
>
> Q. You just took then what the company paid them?
>
> The Master: That objection is sustained.
>
> * * * * * * *
>
> The Master: I won't allow any question
> 160 on that page (p. 6287, fols. 18860-18861).
>
> * * * * * * *
>
> Q. You say whatever was paid all of these general office salaries, were charged to distribution?
>
> The Master: Objection sustained. I said I won't allow another question about that page.

Mr. Chambers: I have a number of 161
others.

The Master: I won't allow another question.

Mr. Chambers: I respectfully except, that is all counsel can do.

The Master: I won't allow any further examination as to that page at this point. It is sufficiently covered.

Mr. Chambers: I do not want to be in 162
contempt of court for asking, but I just take an exception. I did want to ask some more about it.

The Master: That is correct.

Mr. Chambers: That is all counsel can do.

The Master: That is all you can do. If 163
I am wrong about it, the courts will reverse me. I have got to limit this cross-examination somewhere" (p. 6288, fols. 18862–18863).

Due to the absence of any witness with first-hand information as to the transactions supposedly recorded in the general books of account, 164
appellants were compelled to obtain such information as they could from cross-examination of the Witness Teele as to certain limited tests of entries in the books made by him. While this line of cross-examination was in progress the following occurred:

"Q. Did you use the manufacturing books' 165
record of labor on gas production in making your tests?

The Master: I will limit the cross-examination at this point on this subject. Questions not allowed.

Mr. O'Brien: Exception" (p. 6876, fol. 20628).

166 And the Master thereupon ruled out question after question in regard to tests made by the witness concerning the entries in the books (pp. 6876–6893, fols. 20628–20677).

"Mr. O'Brien: Will your Honor state on the record that you will not allow us to except?

167 The Master: I am going to insist on controlling this trial.

Mr. Chambers: I would like to make a statement.

The Master. I won't let you now.

Mr. Chambers: I except to the Master's refusal to allow me to make what I think is a very important statement" (p. 6891).

168 Indeed the Master took upon himself to say just how appellants' counsel should prepare for cross-examination. If their method of preparation did not suit him he peremptorily cut them off as the following citation shows:

And again:

169 Q. Did that item of $1,338,582.14 represent merely what you found on the books under the title 'Renewal and contingency suspense'? A. Mr. Mocran, will you give me my analysis of the charges of plant withdrawn from service? * * * (p. 7485, fol. 22454).

Q. Are you now able to answer the question? A. The question was what?

170 The Master: Whether this item of $1,338,000 odd only included the items you found in renewals and contingency suspense account, or whether you took other items in?

The Witness: For 1918, let me have the adjustment sheets.

The Master: Haven't you got the data so you can say? 171

Mr. Chambers: Your Honor, you cannot do that. I went up there and I informed myself so I know just exactly what questions I want to ask. It cannot be done in the manner you have in mind at all. I went up there and I found out, I covered each one of these items, but I did not ask him particularly about this because I found out generally that I could not proceed here without having a regular cross-examination in the usual way. 172

The Master: What do you mean, a regular cross-examination?

Mr. Chambers: I mean it cannot be done in the manner that you have in mind, and protect our rights. 173

The Master: What is a regular cross-examination?

Mr. Chambers: I want him to tell us, item by item, year by year, how he made this up, and what he used, and if he used the book figures, then let him say so, and that ends it. 174

The Master: Well, I will let him answer that question.

Mr. Chambers: You can shut me out —

The Master: I am going to shut you out again in a minute.

Mr. Chambers: But I do not think it is right or proper.

Mr. O'Brien: Your Honor will note an exception on my part to the Master taking — 175

The Master: You have taken an exception.

Mr. O'Brien: I am taking an exception now to your taking the examination of the witness in hand.

6835, fols. 20441–20463, 20476, 20502). The Mas-
186 ter said.

> "The Master: Mr. O'Brien, before I let you ask another question I want to know whether there is any item on Exhibit 355 (one of Witness Teele's voluminous tabulations of book figures) that you are able to point to as being wrong, and in what respect it is wrong? (p 6878, fol. 20633).
187

Of course, it is not always possible or advisable to tell the Master *and the witness*, just what error counsel expects to reveal by cross-examination, and a great deal of very proper cross-examination on accountancy exhibits of this kind goes to the point of establishing the method pur-
188 sued in making the tabulation as a basis of argument that the exhibit is not reliable. Consequently, it was impossible for appellants' counsel always to state a precise error as erroneously and tyrannically demanded by the Master and consequently they were summarily silenced as appears from the following.

189 > "The Master: The Master rules that, in the light of the statement made by counsel as to the purpose of these questions, that none of them will be allowed as to any of these items, and that no questions will be allowed because the Master is satisfied that counsel has not looked at the underlying data, has not conferred with Mr. Teele or
190 his assistants, and has not prepared himself to point out in terms as Mr. Chambers has done; there will be, therefore, no further cross examination as to any of these items.
>
> Mr. O'Brien: Well, your Honor, in regard to that, I desire to state here that I have not stated fully and I am not able in a hurried

statement broken up by the interruptions of your Honor, to tell what may be the purposes of any inquiry that I am going to make of the witness. I respectfully submit I have a right without stating beforehand that there is a discrepancy in his figure here, to find out how these figures were collated, how much time he put in on them, whether he was on them personally, whether he took oral information or written that has not been disclosed to any of the defendants, whether reports were made to him that have not been handed to us and countless other matters that are involved in a fair, proper cross examination of the witness. 191 192

The Master: All right, I have heard you, and that ends it. Now, Mr. Chambers, have you any questions to ask, and, if so, I am going to let you take up the re-cross again, point out any variances, inferences, failure to include or the exclusion of items as to interest on bank balances, rental of jointly used facilities, miscellaneous rent revenue and revenue from street lamp maintenance, if you have any. 193 194

Mr. Chambers: Yes, I want to cross examine him about those different items.

The Master: Have you any memorandum of any variances that you want to point out, such as you pointed out as to other items?

Mr. Chambers: I have a memorandum. I want to find out where he got his information as to bank balances. 195

The Master: That I will not let you ask, as to where he got the information. That is what I would not let Mr. O'Brien ask.

Mr. Teele, leave the stand; the cross examination is finished.

Mr. O'Brien: Will your honor hear me further, before he leaves the stand?

The Master: After I let Mr. Teele go. Mr. Teele, the cross examination of Mr. O'Brien is ended; the cross examination of Mr. Chambers is ended.

* * * * * * *

Mr. Chambers: Interest on bank balances — I have a number of questions as to that.

The Master: I have finished the cross examination. You have had your opportunity and you would not take it.

Mr. Chambers: You did not let me say anything about rental of joint facilities.

The Master: Next witness, Mr. Ransom.

Mr. O'Brien: If your Honor please, may I state —

The Master: No; no further statement.

Mr. O'Brien: Will your Honor permit me to call your attention —

The Master: No further statement.

Mr. O'Brien (continuing): The points additional to what I have outlined, that I want to bring out from the witness Teele?

The Master: No; I have had all I am going to have. I will call the next witness now.

Mr. Chambers: I wanted to get an answer as to each item.

Mr. O'Brien: Your Honor, will you permit me to ask Mr. Teele before he leaves the court room some questions with regard to the preparation of the data which he says he is preparing?

The Master: Not another question.

Mr. O'Brien: And I note an exception to your Honor's ruling.

Mr. Chambers: Exception" (Record, pp. 7586–7588, fols. 22760–22763).

Witness McMillin, who was called by respondent to testify in regard to the rate of return, and upon whose testimony alone the Master has based

his finding that 8 per cent. was a proper return 201
in this case, was undergoing cross-examination
when the following occurred:

"Q. Would you look for your return upon the cost of the plant, the amount of the original investment?

A. The cost of the plant to me if I was buying it, or its value to whoever operated it. 202
Not watered stock or anything of that kind.

Q. You have in mind a reproduction value?

A. No; I didn't have in mind reproduction value, but you have got to put away something out of your earnings other than simply to pay dividends and interest.

* * * * * * *

Q. Would you hold the same view were 203
you asked the same question as you have been asked this afternoon about a company in Chicago or San Francisco or Boston or Detroit?

A. All of those have their conditions that make every one different.

Q. You were giving us a composite—

The Master: Wait a minute. Mr. McMillin has not finished his answer. 204

A. (Continued) In San Francisco I would not want to own them at any price. In Chicago, not a great deal better. In Boston, very good. Detroit is the best city in America.

The Master: I am going to stop the cross examination. You can go, Mr. McMillin. 205

Mr. O'Brien: Your Honor, I have not finished.

The Master: I have finished. You can go, Mr. McMillin.

Mr. O'Brien: I note an exception to your Honor's ruling.

206 The Master: It is too bad that I have to do that with every witness. I have absolutely got to cut the examination" (pp. 7881–7882, fols. 23642–23645).

The cross-examination had not been extended nor were the questions asked in any way improper. It was merely the whim and arrogance
207 of the Master that terminated appellants' rights.

Again, the following occurred:

"The Master: All right. I have ruled out that question and will not permit any more. Some of those same questions may be proper and applicable as attacking a particular item here.

208 Mr. O'Brien: Well, I am coming to that, your Honor.

The Master: If you will get to that I will let you ask some questions, but I will not let you ask these. Objection sustained" (p. 6780).

Hundreds of other instances of the Master's
209 arbitrary method could be cited but it would be unduly tedious. The reason underlying this most unusual and erroneous procedure, as stated by the Master himself is so remarkable that the Court should examine the record carefully.

While Mr. O'Brien was cross-examining Mr. Teele, the following occurred:

210 "Q. Would you consider the Boy Scouts as part of the operating expenses of this company?

The Master: I do not think that that is useful to me. Objection sustained. I do not care whether he considered it so. He said he took them all in as they were. I

would not spend any more time on that — 211
at the rate of $18,000 a day.

Mr. O'Brien: Your Honor assumes it cost $18,000 a day to run this building.

The Master: No, I am assuming the complainant is losing $18,000 a day, according to its claim.

Mr. Ransom: More than that now.

The Master: More than that now, I 212
must assume, on Judge Ransom's statement, for the purpose of limiting cross-examination where I think it is unnecessary" (p. 6756, fols. 20266, 20267).

So that here we have the Master in effect assuming during the trial the truth of the allegations in the complaint and statements made 213
by respondent's counsel. The allegation of operating losses which the Master was to pass on and which the respondent had the burden of proving "beyond any just or fair doubt," the Master *assumed to be true* and therefore cut off cross-examination by appellants, and that early in the trial. When this arrogant attitude on the part of 214
the Master is considered how can it be said that the appellants had a fair trial, how can it be said that the respondent was forced to carry and has carried the burden of proof.

Judgments, because of the arbitrary or unfair conduct of a trial judge, have been reversed by the courts for far less than took place here. 215

In the case of *Tuchfeld* v. *Plattner*, 116 N. Y. Supp. 693, a judgment in favor of the plaintiff was reversed on the ground that the trial judge manifested a hostile attitude towards defendant's counsel.

In the case of *Wheeler* v. *Wallace*, 53 Mich. 355,

19 N. W. 23, a judgment was reversed because of the demeanor of the trial judge.

In the case of *Bolte* v. *Third Ave. R. Co.*, 38 App. Div. 234, a judgment was reversed because the Court took the examination of the plaintiff's witnesses out of his counsel's hands and proceeded to bring out the plaintiff's case upon points which were not touched upon in the examination by plaintiff's counsel, and also asked questions which were leading in form and which would have been incompetent in their nature had they been asked by plaintiff's counsel.

In the course of the opinion in that case written by Rumsey, J., it was said (p. 238):

> "Ordinarily the interests of justice are best subserved, and the rights of suitors best attained if the Judge leaves to counsel the duty of bringing out the evidence, and of clearing up disputed points by cross-examination, and rules upon questions of law that are presented to him, and submits to the jury fairly and plainly and impartially the case upon which they are to pass.
>
> Many years ago it was said by a learned Judge and great philosopher:
>
> It is no grace to a judge first to find that which he might hear in due time from the bar, or to show quickness of conceit in cutting off evidence or counsel too short, or to prevent information by questions, though pertinent. The parts of a judge in hearing are four: To direct the evidence; to moderate length, repetition, impertinency of speech; to recapitulate, select and collate the material points of that which hath been said, and to give the rule or sentence" (p. 239).
>
> "This statement of the duties of a judge is not only well put, but represents that duty

now just as clearly as when it was written 221
by Lord Bacon over three hundred years
ago" (p. 239).

In the case of *Peterson* v. *Eighmie*, 175 App. Div. 113, a judgment was reversed because the Court criticised the attorney for the defendant, charging him with "petty practices" and "killing time," etc. 222

In the case of *Hunt* v. *Becker*, 173 App. Div. 9, a judgment was reversed because the statements made by the trial court that the testimony on one side or the other is false and characterizing the witnesses as "unfit to associate with decent, honest, reputable people."

In the case of *Kleinert* v. *Federal Brewing Co.*, 223
167 App. Div. 485, judgment was reversed because the Court accused counsel of duplicity, ignorance, and bad faith. In the course of the opinion, written by Mr. Justice Woodward, it was said (p. 488):

"Generally speaking, counsel has a right
to present his theory of the case, or at least 224
to offer to present it without being accused
of duplicity, ignorance or bad faith, and
where the trial court transgresses this right
of counsel, invading, as it does, the rights of
litigants, it is the duty of appellate courts,
in the interests of the orderly administration
of justice, to reverse the verdict and send
the case back for a new trial, and this should 225
be the disposition of the case now before us.
(See *Swan* v. *Keough*, 35 App Div., 80;
Beers v. *Metropolitan Street Railway Co.*,
88 id., 9)" (p. 488).

Of course, most of these cases were trials be-

226 fore a jury. But, nevertheless, the conduct and attitude of the Master here had its damaging effect upon counsel and the witnesses. Cutting off cross-examination was prejudicial and harmful to the defendants and no one knows the amount of damage wrought by such procedure.

The failure of the Master to follow the well
227 settled rules of law laid down by this Court and other tribunals deprived the appellants of their rights and cannot be cured except by the granting of a new trial or a dismissal of the complaint.

We think we are well within moderation when we say, as we did, in our motion to dismiss, that the proceedings before the Master were a
228 nullity.

Certainly, the appellants did not have a trial such as is guaranteed by the Constitution and observed by the rules and decisions of the courts.

POINT II

Respondent enjoyed an adequate return upon the fair value of its property from its inception up to the
229 **end of the year 1917. The evidence shows that not only did it enjoy such a fair return but it made enormous profits throughout this entire period.**

For the sake of convenience we shall divide this point into two sub-headings:

In the first we shall discuss the enormous profits made by respondent prior to the enactment of
230 the rate statute here assailed; and in the second we shall discuss the enormous profits made by respondent from the time the act in question went into effect in 1906, up to and including the year of 1917.

First: The enormous earnings prior to the passage of the statute in question.

We have noted in our preliminary statement 231
that the respondent was formed by the consolidation of six other companies in 1884.

As to the earnings prior to consolidation, Mr. Justice Peckham said, in the prior suit:

> "The evidence shows that from their creation, down to the consolidation in 1884, these companies had been free from legisla- 232
> tive regulation upon the amount of the rates to be charged for gas. They had been most prosperous and had divided very large earnings in the shape of dividends to their stockholders, dividends which are characterized by the Senate committee, appointed in 1885 to investigate the facts surrounding the consolidation, as enormous. The report of 233
> that committee shows that several of the companies had averaged, from their creation, dividends over sixteen per cent, and the six companies in the year 1884 paid a dividend upon capital which had been increased by earnings, as in the case of the Manhattan and the New York, of eighteen per cent., and had it been upon the money actually paid in, it would have been nearly 234
> twenty-five per cent."
>
> *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, p. 45.

This consolidation was subject to a legislative investigation reported in Senate Document 47 (Respt's Ex. 398, p. 16898; Defts' Ex. AA46, p. 235
17706).

The Committee found, among other things, the actual capital contributed by the stockholders of these six companies amounted to only the sum of $8,727,050 (Senate Document 47, p. xxviii; record, p. 17728), and that there had been paid to capital

from surplus profits, $4,284,700 (Senate Document 47, p. xxix (record, p. 17729), and that there was issued for property shares representing par value the sum of $2,488,250 (p. 17729). The sums above mentioned aggregating $15,703,939 "comprehend the actual capital of all constituent companies at the time of the consolidation." And further:

> "The total cost from all sources of property paid for by stockholders' original contributions, by surplus earnings, by stock treated as money, and from the proceeds of bonds and other loans, was as follows:

Company	Total Cost of Properties
Manhattan	$4,872,999 49
New York	4,630,642 63
Metropolitan	5,292,175 35
Municipal	4,032,347 86
Knickerbocker	810,481 15
Harlem	1,243,986 97
Total cost	$20,942,632 85

It was found that the total outstanding indebtedness of the same companies was then $2,329,000. This sum, therefore, should be deducted from $20,942,632 as the properties nominally costing the last named sum were subject to those debts.

The conclusion, therefore, follows, that from the books of the constituent companies their actual investment was not greater than $18,613,632.

This sum should be further diminished by the proper amount to represent actual loss

of mains, apparatus, wear and tear, and destroyed or impaired property." 241

(Senate Document, 47, xxx; Appellants Exhibit AA46, p. 17730.)

Upon consolidation the capital of the constituent companies was enlarged in the following proportions:

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Name of Company	Old share capital	New share capital
New York	$4,000,000	$7,560,000
Manhattan	4,000,000	11,940,000
Metropolitan	2,500,000	7,175,000
Municipal	3,000,000	5,100,000
Knickerbocker	1,500,000	3,000,000
Harlem	2,000,000	3,000,000
	$17,000,000	$37,775,000

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(Senate Document 47, p. xxxiii, p. 17732.)

The above valuation was based not upon the valuation of the property of the constituent companies but upon the aggregate market value of the shares of their capital stock, which market value was in all cases largely inflated by the profits which the companies had been and were earning. 244

Respondent proceeded to value the property coming to it by merger in the sum of $29,994,000. As was said by the Senate Committee: 245

"The entire properties when valued or pretended to be valued in this way are scheduled by the managers at $29,994,000.

This scheduled estimation of $29,994,000,

246 therefore, necessarily comprehended an overvaluation of all there was or could have been of properties, franchises and rights belonging to all the constituent companies.

The arbitrary addition, therefore, to this sum of more than twenty-five per cent. of this excessive valuation not only savors of fraud to some innocent stockholders who ap-
247 proved it but amounted to a public wrong.

Instead of $29,994,000 the consolidation capital appears scheduled at $39,078,000. This result is attained not only by excessive estimations according to the scheduled items but by their actual duplication."

(Senate Document 47, Defendants' Exhibit AA46, p. 17744.)

248 Of this capitalization fixed at $39,000,000, the Chairman of the Committee reported that:

"A fair and meritorious capitalization of the constituent companies consolidating would have been at some figure between $15,000,000 and $20,000,000."

(Senate Document 47, Defendants'
249 Exhibit AA46, p. 17747.)

What the earnings upon this excessive capitalization were does not appear in the record for the period prior to 1906, though the District Court stated in the prior suit that dividends had been maintained throughout the period. (*Con-*
250 *solidated* v. *City of N. Y.*, 157 Fed. Rep. 849, p. 879.) Suffice it to say that the accumulated discontent of the people because of the great and excessive profits of this monopoly resulted in 1905 in the famous investigation of gas companies in New York and Brooklyn by a committee whose counsel was the present Secretary of State.

Charles Evans Hughes. As a result of this investigation, the rate for gas which had been $1.00 per thousand was reduced to 80 cents per thousand by the statute, chapter 125 of the Laws of 1906, here assailed. 251

Second: During the period of 1906 to 1917, inclusive, respondent has made far more than a fair return from its gas business and indeed its profits may reasonably be said to have been tremendous. 252

The bill of complaint herein alleged that

> "at no time since the said rate went into effect, has it permitted your orator to earn a fair return thereon" (p. 6a). 253

It further states,

> "there now exists an aggregate deficiency in your orator's earnings below six per cent., since the date the said eighty cent rate was made effective, in the amount of at least $12,000,000" (p. 4a).

No finding was made either by the Master or by the District Court as to these allegations, or as to the results of operations from 1906 to 1917, inclusive, and this alone is sufficient to show that the rate was not confiscatory in those years. 254

But the Master, though he failed to make a finding did make a very definite pronouncement after respondents' case had closed. He said: 255

> "I am not going in this case to decide that they should have discontinued some plant seven years ago, or that fourteen feet of land ought not to have been used at some time. I won't do it. I do not think it is necessary for this case; *because I think, after all, there won't be and cannot be evidence which would justify a finding that they did not get a fair*

256 *return down to December 31st, 1917*" (p 11117, fol. 33350).

There is thus no question as to respondents having had a fair return during those years, particularly in default of any assignment of error by respondent on account of the failure of either the
257 Master or the District Court to sustain its claims as to these prior years.

It is important to note, however, how great were the earnings of respondent during the first twelve years in which the statute operated.

Since the allegation of confiscation is made, it is proper that the same vigorous rule be applied
258 to the earnings in prior years as should apply to the years 1918 and 1919. The District Court, as we shall point out more fully later was, we feel, far from vigorous in its treatment of the operating expenses of these later years, and the actual earnings were far higher than the Court found.

However, for the purpose of showing the excessive earnings in these prior years, it will be suf-
259 ficient to adopt the Court's theories without in any way conceding the correctness thereof.

Below (pp. 62-66) in Tables I and II, appear a statement of the earnings of respondent in the years 1906 to 1917 calculated as nearly as may be in accordance with the rules and with the deductions from operating expenses made by the
260 District Court for 1918 and 1919. Except partially as to the year 1917, however it should be noted that there has been no attempt to put the cost of manufacture, as the Court properly did, on the basis of cost in its most efficient plant (p. 160a). All of the plants of respondent are taken, good, bad and indifferent. The cost of making

gas at the efficient portions of the Astoria plant is averaged with the cost at the less efficient portions of that plant and at the highly inefficient plants of the Consolidated Gas Co. on Manhattan Island. Thus in 1916 the cost per thousand made ranges from $.1747 per thousand for coal gas at the Astoria to $34.20 per thousand at the antiquated 14th Street plant. (See Exhibits AA401, p. 18701; AA131, p. 18121.) If the cost of manufacture at a reasonably efficient plant were taken, which should be used as a test, the earnings during these years would be much larger. To a lesser extent this is true in 1917 where the cost at the Astoria plant as a whole is taken instead of the cost of the efficient portions of that plant. As the tables show, also, there are numerous other instances in which no deduction has been made, although the Court's opinion would justify them. Suffice it to say here, however, that the tables show really a modest and moderate statement of the earnings of respondent during those years.

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This statement, modest as it is, gives sufficiently startling results. The returns for these years and the capital sum on which they would respectively pay a six per cent return is as follows:

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	Return Table I	Capital sum upon which this would yield a 6% return
1906	$4,649,822 03	$77,497,033 84
1907	3,710,520 84	61,842,014 00
1908	3,375,448 69	56,257,478 17
1909	4,388,960 44	73,149,340 68
1910	4,632,124 80	77,202,080 00
1911	4,645,470 26	77,424,504 34
1912	4,297,092 75	71,618,212 50
1913	4,365,549 31	72,759,155 16
1914	3,923,888 56	65,398,142 67
1915	4,491,011 54	74,850,192 34
1916	4,501,137 78	75,018,963 00
1917	4,514,981 41	75,249,690 00

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266 Since the Court made no finding as to the earnings during these years so it made no finding as to the fair value of the property of respondent in those years on which it was entitled to a return. It is not difficult, however, to construct a rate base, so called, for these years on the basis of the Court's findings for 1918 and 1919, solely for the pur-
267 poses of illustration without in any way conceding its correctness, and this we have done below (p. 69), Table III. The Court took generally the book values of the various properties without deduction for depreciation which it denominates "Reproduction Value Estimated from their Cost" (pp. 143a–147a, 174a–181a). It of course
268 started with the inflated valuations of 1884 which were the basis of the book figures and this appellants contend, and will argue more fully later, was erroneous. This alone, as we have pointed out above, adds some $20,000,000 to the actual cost of respondent's property.

Appellants made careful proof of its claims as
269 to the cost of respondent's property used in the gas business during these years. This is based on actual cost not inflated by the watered capitalization of 1884 and makes allowance for depreciation. A concise statement of appellants' claims appears in Exhibit AA466 (pp. 13324, 19125). This table does not contain any item for the cost of the Astoria plant, nor of the general
270 office building nor of the so-called 57th Street building, the last two being attacked by appellants as not used and useful in respondents' gas business. We still maintain our claims in this respect but solely for the purposes of comparison with the rate base on the Court's theories the

book cost of these properties are in Table IV 271
below (p. 71) added to appellants' rate base as shown on Exhibit AA466 (pp. 13324, 19125), referred to above.

We give below a comparative table showing the excess earnings above a fair return of six per cent both upon appellants' rate base as adjusted for comparative purposes and on that con- 272
structed on the Court's theories:

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Year	Actual return	Appellants rate base, adjusted, and Astoria included	6% thereon	Excess over 6% earned thereon	Rate base constructed on court's theory	6% thereon	Excess over 6% earned thereon
1906	$4,649,822 03	$30,221,379 56	$1,813,282 77	$2,836,539 26	$51,238,927 30	$3,074,335 64	$1,575,486 39
1907	3,710,520 84	32,971,408 18	1,978,288 09	1,732,232 75	53,949,084 20	3,236,945 05	473,575 79
1908	3,375,448 69	33,596,835 08	2,015,810 10	1,359,638 59	54,406,129 26	3,264,367 76	111,080 93
1909	4,388,960 44	33,866,326 61	2,031,979 60	2,356,980 84	55,485,978 36	3,329,158 70	1,059,801 74
1910	4,632,124 80	35,744,772 99	2,144,686 38	2,487,438 42	57,564,961 87	3,453,897 71	1,178,227 09
1911	4,645,470 26	38,116,478 05	2,286,988 68	2,358,481 58	59,946,315 61	3,596,778 94	1,048,691 32
1912	4,297,092 75	40,640,187 49	2,438,411 25	1,858,681 50	62,726,393 13	3,763,583 59	533,509 16
1913	4,365,549 31	41,284,600 75	2,477,076 05	1,888,473 26	62,554,308 66	3,753,258 52	612,290 79
1914	3,923,888 56	41,317,079 36	2,479,024 76	1,444,863 80	61,121,310 77	3,667,278 65	256,609 91
1915	4,491,011 54	40,921,709 23	2,455,302 55	2,035,708 99	61,737,658 64	3,704,259 52	786,752 02
1916	4,501,137 78	41,218,928 19	2,473,135 69	2,028,002 09	66,325,352 63	3,979,521 16	521,616 62
1917	4,514,981 41	41,679,653 51	2,500,779 21	2,014,202 20	66,882,786 79	4,012,967 21	502,014 20
Total				$24,401,243 28			$8,659,655 96

So that we see that even upon the Court's theory of the property upon which respondent is entitled to a return, a theory vitally erroneous and allowing a return on many millions never invested, this prosperous company has earned no less than $8,659,655.96 over and above a fair return during these years. While on the liberal basis of appellant's claims it has exceeded a fair return by $24,401,243.28. 281 282

Nor should it be lost sight of that the excess above pointed out is not by any means all that this monopoly has been able to put away during these prosperous years. As Sangster points out (pp. 11741–11742) there was accumulated at Astoria out of operating expenses paid by the respondent the sum of $3,384,253.90 on December 31, 1916, which should be added to the excess above noted, which will make a total excess of $27,785,497.18 upon the appellant's rate base and in excess of $12,043,909.86 upon the Court's rate base. 283

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Table I — NET PROFIT ADJUSTED, 1906–1916

	1906	1907	1908	1909	1910	1911
Net profit from gas business (Ex. 366)	$4,739,371 26	$2,855,610 10	$2,363,803 13	$3,331,758 07	$3,449,513 52	$3,559,017 88
Add —Adjustments:						
Interest on investments paid to Astoria Lt. Heat & Pr. Co. (p. 11,773) (b)	.....	736,514 69	801,107 81	853,324 39	891,427 94	901,535 79
Interest on taxes (Ex. 390, Id.) (c)	95,195 08	120,657 67	127,629 35	147,713 17	70,318 60	51,707 36
Interest on consumers deposits (Ex. 366) (d)	41,628 37	48,033 04	49,943 18	49,145 22	70,205 01	53,135 32
Tax on real estate corporation (Ex. 392, Id.) (e)	22 18	22 27	.....	.....	105 47	215 31
Special franchise tax excess accrual over payment (Def. Ex. A. A. 256) (f)	.....	.....	.....	.....	.....	.....
One-third salaries of general officers, transfer, accounting and cashiers departments (Ex. 260–271) (g)	(a)	(a)	(a)	52,888 68	55,828 17	57,900 92
Proportion general office supplies and expense (g)	(a)	(a)	(a)	36,031 93	19,173 00	20,598 83
One-third legal expenses (Def. Ex. A. A. 129) (h)	43,679 32	34,277 55	26,666 66	31,074 39	21,980 96	14,012 17
Ten percent of repairs to meters and appliances (Def. Ex. A. A. 129) (i):						
Meters	17,204 60	16,768 23	19,854 24	21,285 52	16,104 91	18,902 86
Appliances	5,988 46	7,266 80	8,723 95	7,271 70	9,077 31	7,741 59
Difference between amount set aside for renewals and replacements by Company, and 3.73 cents per M cu. ft. of gas sold found by court (Court opinion p. 171a)	*317,195 54	*154,388 62	*79,429 67	*204,670 06	*40,678 72	*112,789 94
Taxes on property not used or useful (Def. A. A. 255):						
Block 982, Lot 13	7,024 77	7,053 70	7,666 83	7,970 69	8,350 02	8,181 78
Block 988, Lot 1	8,133 90	8,167 44	8,877 38	9,229 22	9,492 66	9,301 39
Block 1089, Lot 1	1,831 20	12,622 41	15,333 66	15,941 38	16,700 05	16,363 56
Block 1090, Lot 23	783 81	1,084 04	1,307 39	1,359 21	1,423 89	1,395 20
Block 1107, Lot 7	1,257 06	1,410 74	1,775 47	2,265 35	2,373 16	2,497 59
One third of block 3236, Lot 1	.....	.....	.....	.....	703 16	1,291 86
Insurance participation income (Def. Ex. A. A. 128 Id.)	2,217 56	3,314 46	4,577 88	5,944 95	7,436 70	8,980 37
Insurance fund income (Def. Ex. A. A. 128 Id.)	2,680 00	2,180 00	2,030 00	2,180 00	2,485 55	1,180 00

Astoria Light, Heat and Power:						
Fire insurance income (p. 11,766) (*k*)		156 71	355 14	857 46	1,367 51	1,956 16
Cash discount (p. 11,766) (*k*)		1,036 00	807 93	975 13	2,372 15	3,768 82
Gross earning tax (p. 11,765) (*k*)		8,733 61	14,418 36	16,414 04	16,363 78	17,575 44
Federal income tax (p. 11,765) (*k*)						
Excess dividends tax (p. 11,765) (*k*)						
One-half Astoria tunnel rent (p. 11,765) (*l*)						
Total net profit — adjusted	$4,649,822 03	$3,710,520 84	$3,375,448 69	$4,388,960 44	$4,632,124 80	$4,645,470 26

(*) Denotes deduction.
(*a*) Figures are not available.
(*b*) Interest on investments paid to Astoria Lt., Heat & Pr. Co., excluded as an operating expense, and the investment included in the rate base. Court s opinion, p. 180a.
(*c*) Court's opinion, p. 169a.
(*d*) Court's opinion, p. 165a.
(*e*) Court's opinion, p. 168a.
(*f*) Court's opinion, p. 168a.
(*g*) Court's opinion, p. 163a.
(*h*) Court's opinion, p. 164a.
(*i*) Court's opinion, p. 163a.
(*j*) No addition is made for taxes on Block 985, Lot 7, Block 989, Lot 1, or Block 1457, Lot 6, as shown by Court's opinion, p. 169a.
(*k*) These items are included as an addition to the net profit and the investment at Astoria is included in the rate base. Court's opinion, p. 180a.
(*l*) Portion of the Astoria tunnel rent excluded from operating expenses, and portion of the investment included in rate base.

Table I — Net Profit — Adjusted, 1906–1916 — *(Concluded)*

	1912	1913	1914	1915	1916
Net profit from gas business (Ex. 366)	$2,925,457 17	$2,410,154 40	$1,323,609 17	$2,501,165 49	$2,552,947 00
Add — adjustments:					
Interest on investments paid to Astoria Lt., Heat & Pr. Co. (p. 11,773) (*b*)	1,013,937 59	1,098,742 36	1,124,753 04	1,118,739 87	1,147,737 35
Interest on taxes (Ex. 390 Id.)	75,861 48	101,718 96	134,048 91	79,065 13	53,992 13
Interest on consumers deposits (Ex. 366) (*d*)	51,858 47	48,994 04	45,941 44	45,498 77	44,368 48
Tax on real estate corporation (Ex. 392, Id.) (*e*)	682 59	119,822 00	117,459 70	122,816 89	134,103 20
Special franchise tax excess accrual over payment (Def. Ex. A. A. 256) (*f*)		148,848 43	146,366 49		60,412 44
One-third salaries of general officers, transfer, accounting and cashier's departments (Ex. 260-271) (*g*)	59,532 96	62,269 28	59,940 77	59,539 68	63,703 00
Proportion general office supplies and expense (*g*)	23,627 00	23,300 24	28,767 48	28,270 71	36,561 20
One-third legal expenses (Def. Ex. A. A. 129) (*h*)	14,916 27	13,901 45	19,230 90	25,175 10	11,509 89
Ten percent of repairs to meters and appliances (Def. Ex. A. A. 129) (*i*):					
Meters	17,787 27	18,832 53	22,516 39	25,734 90	23,440 67
Appliances	7,312 40	8,513 73	21,737 24	17,374 70	16,838 25
Difference between amount set aside for renewals and replacements by company, and 3.73 cents per M cu. ft. of gas sold found by court. (Court opinion p. 171a)	26,558 02	158,684 16	722,800 17	296,982 85	*53,223 21
Taxes on property not used or useful, (Def. Ex. A. A. 255) (*j*):					
Block 982, Lot 13	8,692 50	15,258 30	15,005 40	15,764 00	16,626 00
Block 988, Lot 1	9,882 00	27,113 80	26,664 40	28,012 60	30,957 00
Block 1089, Lot 1	17,385 00	43,892 50	43,165 00	45,347 50	49,470 00
Block 1090, Lot 23	1,482 30	1,466 10	1,441 80	1,514 70	1,652 40
Block 1107, Lot 7	2,653 50	2,805 50	2,759 00	7,480 00	8,160 00
One-third of Block 3236, Lot 1	2,440 00	5,105 60	4,714 10	5,173 33	6,966 67
Insurance participation income (Def. Ex. A. A. 128 Id.)	10,422 58	11,772 11	13,133 72	13,993 67	30,068 40
Insurance fund income (Def. Ex. A. A. 128 Id.)	1,546 67	1,180 00	1,180 00	1,180 00	1,180 00
Astoria Light, Heat and Power:					
Fire insurance income, (p. 11,766) (*k*)	2,536 88	3,356 79	4,294 37	4,988 32	11,518 34
Cash discount, (p. 11,766) (*k*)	3,752 88	4,438 42	3,843 34		
Gross earning tax (p. 11,765) (*k*)	18,767 22	26,532 56	30,417 85	25,407 48	27,362 26
Federal income tax (p. 11,765) (*k*)		9,846 08	10,097 88	15,785 85	26,976 16

Excess dividends tax (p. 11,765) (*k*)				6,000 00	6,000 00
One-half Astoria tunnel rent (p. 11,765) (*l*)					191,810 15
Total net profit — adjusted	$4,297,092 75	$4,365,549 31	$3,923,888 56	$4,491,011 54	$4,501,137 78

(*b*) Interest on investments paid to Astoria Lt., Heat & Pr. Co., excluded as an operating expense, and the investment included in the rate base. Court's opinion, p. 180a.
(*c*) Court's opinion, p. 169a.
(*d*) Court's opinion, p. 165a.
(*e*) Court's opinion, p. 168a.
(*f*) Court's opinion, p. 168a.
(*g*) Court's opinion, p. 163a.
(*h*) Court's opinion, p. 164a.
(*i*) Court's opinion, p. 163a.
(*j*) No addition is made for taxes on Block 985, Lot 7, Block 989, Lot 1, or Block 1457, Lot 6, as shown by Court's opinion, p. 169a.
(*k*) These items are included as an addition to the net profit and the investment at Astoria is included in the rate base. Court's opinion, p. 180a.
(*l*) Portion of the Astoria tunnel rent excluded from operating expenses and portion of the investment included in rate base.

305 304 303 302 301

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Table II.

Return in 1917 on Court's Basis.

Cost of coal gas per thousand made (a)	$0.2283
Cost of water gas per thousand made.	0.3080
307 Average cost on the basis of 16.8 per cent coal gas and 83.2 per cent water gas (b)	$0.2946
Cost of gas per thousand sold on the basis of 4.1 per cent (Judge Hand's figure, p. 153a) unaccounted for...	$0.3072
308 Gas Storage (Judge Hand's figure, p. 171a)	0.0097
Taxes (Judge Hand's figure for 1918, p. 170a)	0.0628
Maintaining Astoria (Judge Hand's figure, p. 167a)	0.0044
309 Renewals and Replacements (Judge Hand's figure, p. 171a)	0.0373
Distribution (Judge Hand's figure for 1918, p. 167a)	0.1846
	$0.6060
Miscellaneous operating revenue (p. 18457)	0.0741 Cr.
310	$0.5319
Average selling price (Ex. AA261)	0.7992
Excess per thousand cubic feet sold	$0.2673

The sales for this year being 16,891,064 thousand cubic feet (Ex. AA244), this gives a return of $4,514,981.41. 311

(a) The cost of gas made at Astoria is shown by the annual report of the Astoria Light, Heat & Power Company, part of which was put in evidence by appellants (p. 12450). The Astoria books were also put in evidence (pp. 11297–11298) as admissions against interest only. 312

The report shows (p. 55) the make of coal and water gas, the cost and the cost per thousand as follows:

	Coal Gas	Water Gas
Made, M. cu. feet...	3,079,736	6,162,386
Cost	$582,878.37	$2,018,416 35
Cost per thousand reported	18 50	32 66

313

It appears, however (p. 12 of the report), that the coal-gas cost includes only the cost of enrichment paid to the New Amsterdam Company of $119,527.79. This company enriched 1,499,904 M cubic feet, or almost exactly half of the coal-gas make. 314

Assuming the cost of enriching the other half at Astoria to be the same, it is necessary to increase the reported cost of the coal-gas made by, say $120,000, and reduce the cost of water gas by the same amount.

This results as follows:

	Coal Gas	Water Gas
Cost	$582,878.37	$2,018,416.35
Plus	120,000.00	
Minus		120,000.00
	$702,878.37	$1,898,416.35
Cost per thousand made	.2283	.3080

315

316 (b) In 1917 the Consolidated made and bought (Exhibits AA138 and AA404) 3,080,836 M cubic feet of coal gas and 15,253,706 M cubic feet of water gas. The percentage of coal gas for the year is therefore 16.8 per cent and of water gas 83.2 per cent, and the weighted average cost of the gas made is $.2946 per thousand cubic feet
317 made.

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319

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TABLE III — RATE BASE FOR YEARS 1906-1917 INCLUSIVE, PREPARED ON THE BASIS OF THE COURT'S FINDINGS, FOR PURPOSES OF ILLUSTRATION, WITHOUT CONCEDING IN ANY WAY ITS CORRECTNESS.

(As of December 31st)

	1906	1907	1908	1909	1910	1911
21st street station (plant) (Ex. 472)	$3,781,960 22	$3,818,287 15	$3,615,636 82	$3,621,022 80	$3,628,052 60	$3,654,774 26
18th street station (Ex. 472 and 476)	2,300,762 55	2,301,423 51	2,301,447 17	2,302,121 93	1,803,659 85	1,805,620 05
44th street station (Ex. 472 and 476)	1,968,689 32	1,969,487 56	1,971,970 76	1,978,471 28	1,998,625 36	1,992,186 58
63rd street station (Ex. 472)	576,108 93	398,919 56	399,400 22	400,580 63	400,580 63	400,930 16
65th street station (Ex. 472)	1,180,553 30	1,186,716 06	1,186,834 96	1,186,834 96	1,187,922 30	1,187,274 05
99th street station (plant) (Ex. 472)	1,107,483 74	1,103,308 74	1,104,212 81	1,105,213 21	1,109,715 02	1,115,205 98
111th street station (Ex. 472)	1,044,672 22	1,044,075 63	1,062,224 74	1,011,653 48	1,036,350 97	1,021,066 93
Kingsbridge holder (Ex. 472)					275,258 89	715,053 92
132nd street station (Ex. 472)	441,745 63	443,287 37	442,915 23	447,573 27	447,629 69	464,180 30
132nd street testing station (Ex. 472)						
14th street holder as adjusted (Ex. 472 and 476)						
Engineering item (Ex. 472)	959,052 57	953,483 57	963,365 16	963,712 09	967,483 73	939,048 56
	84,554 81	97,648 87	112,859 94	139,118 46	167,473 78	204,713 54
Total plants	$13,445,583 29	$13,316,638 02	$13,160,867 81	$13,156,302 11	$13,022,752 82	$13,500,054 32
Meters, etc. (Ex. 474)	$3,967,023 72	$4,190,902 39	$4,262,842 80	$4,509,381 83	$4,793,776 18	$5,057,109 42
Mains (Ex. 473)	7,494,756 19	7,782,339 35	7,793,637 16	8,019,445 98	9,119,442 40	9,665,668 98
Services (Ex. 473)	1,237,339 54	1,291,160 26	1,275,733 41	1,271,325 83	1,267,314 48	1,259,192 84
Land (court's op. 176a)	7,029,035 00	7,029,035 00	7,029,035 00	7,029,035 00	7,029,035 00	7,029,035 00
Conduits jointly used (court's op. 178a)						
Office buildings (Ex. AA465)	65,173 00	65,199 00	65,224 00	69,772 00	75,280 00	260,977 00
Present Astoria plant and land (p. 11,761)	8,219,016 56	10,492,792 18	11,037,789 08	11,649,715 61	12,476,360 99	13,393,278 05
New Astoria plant now building (court's op. 173a)						
Working capital (court's op. 181a)	2,000,000 00	2,000,000 00	2,000,000 00	2,000,000 00	2,000,000 00	2,000,000 00
Total	$43,457,927 30	$46,168,084 20	$46,625,129 26	$47,704,978 36	$49,783,961 87	$52,165,315 61
Franchises	$7,781,000 00	$7,781,000 00	$7,781,000 00	$7,781,000 00	$7,781,000 00	$7,781,000 00
Grand total	$51,238,927 30	$53,949,084 20	$54,406,129 26	$55,485,978 36	$57,564,961 87	$59,946,315 61

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(9)

TABLE III — RATE BASE FOR YEARS 1906-1917 INCLUSIVE, PREPARED ON THE BASIS OF THE COURT'S FINDINGS, FOR PURPOSES OF ILLUSTRATION, WITHOUT CONCEDING IN ANY WAY ITS CORRECTNESS — *(Concluded)*

(As of December 31st)

	1912	1913	1914	1915	1916	1917
21st street station (plant) (Ex. 472)	$3,711,067 57	$3,744,266 21	$3,767,133 99	$3,770,952 88	$3,770,986 38	$3,768,553 42
18th street station (Ex. 472 and 476)	1,805,967 05	1,056,596 26	169,577 25	169,886 06	151,885 48	
44th street station (Ex. 472 and 476)	2,004,416 93	2,005,805 73	714,583 64	714,583 64	714,586 64	714,583 64
63rd street station (Ex. 472)	401,007 51	401,198 48	401,198 48	401,198 48	401,204 48	401,204 48
65th street station (Ex. 472)	1,213,592 90	1,238,677 04	1,243,131 03	1,249,616 24	1,244,713 65	1,243,814 12
99th street station (plant) (Ex. 472)	1,137,772 43	1,145,198 87	1,147,795 83	1,140,529 88	1,141,282 04	1,152,620 03
111th street station (Ex. 472)	1,020,144 11	1,022,721 68	1,071,059 68	1,082,235 74	1,082,735 67	1,086,132 26
Kingsbridge holder (Ex. 472)	895,432 15	905,987 80	906,379 90	906,871 00	907,475 24	909,101 18
132nd street station (Ex. 472)	472,482 70	473,547 29	473,763 14	473,763 14	473,911 53	475,881 24
132nd street testing station (Ex. 472)					7,450 00	7,450 00
14th street holder as adjusted (Ex. 472 and 476)	954,055 27	974,298 86	982,369 15	982,935 34	583,481 30	584,503 06
Engineering item (Ex. 472)	249,975 74	293,129 33	338,268 26	381,307 21	260,903 11	233,144 51
Total plants	$13,865,914 36	$13,261,427 55	$11,215,260 35	$11,273,939 61	$10,740,612 52	$10,636,987 94
Meters, etc. (Ex. 474)	$5,203,728 59	$5,301,680 90	$5,344,272 83	$5,666,698 87	$5,981,541 98	$6,342,347 63
Mains (Ex. 473)	10,625,600 06	10,814,345 70	10,842,117 34	10,917,682 69	10,960,813 21	10,986,091 88
Services (Ex. 473)	1,258,917 63	1,250,758 76	1,218,972 89	1,219,545 24	1,221,240 73	1,234,731 83
Land (court's op. 176a)	7,029,035 00	7,029,035 00	7,029,035 00	7,029,035 00	7,029,035 00	7,029,035 .0
Conduits jointly used (court's op. 178a)					4,400,000 00	4,400,000 00
Office buildings (Ex. AA466)	637,436 00	528,442 04	923,646 08	987,113 64	1,240,870 76	1,383,787 76
Present Astoria plant and land (p. 11,761)	14,324,761 49	14,587,618 71	14,767,006 28	14,862,643 59	14,970,238 43	15,088,804 75
New Astoria plant now building (court's op. 173a)						
Working capital (court's op. 181a)	2,000,000 00	2,000,000 00	2,000,000 00	2,000,000 00	2,000,000 00	2,000,000 00
Total	$54,945,393 13	$54,773,308 66	$53,340,310 77	$53,956,658 54	$58,544,352 63	$59,101,786 79
Franchises	$7,781,000 00	$7,781,000 00	$7,781,000 00	$7,781,000 00	$7,781,000 00	$7,781,000 00
Grand total	$62,726,393 13	$62,554,308 66	$61,121,301 77	$61,737,658 64	$66,325,352 63	$66,882,786 79

TABLE IV — RATE BASE FOUNDED ON COST INCLUDING ASTORIA PLANT AND LAND, GENERAL OFFICE BUILDING AND WEST 57TH STREET PROPERTY, WHICH APPELLANTS CONTEND SHOULD BE EXCLUDED.

(As of December 31st)

	1906	1907	1908	1909	1910	1911	1912
Land (Ex. AA-466)	$1,964,389 00	$1,970,289 00	$1,958,783 00	$1,958,783 00	$2,063,884 00	$2,080,753 00	$2,072,632 00
Other fixed capital (Ex. AA-466)	18,567,801 00	18,953,188 00	19,045,039 00	19,168,056 00	19,929,248 00	21,141,470 00	22,405,358 00
Working capital (Ex. AA-466)	1,205,000 00	1,290,000 00	1,310,000 00	820,000 00	909,000 00	940,000 00	900,000 00
Construction capital (Ex. AA-466)	200,000 00	200,000 00	180,000 00	200,000 00	300,000 00	300,000 00	300,000 00
Engineering, administration, etc. (Ex. AA-466) *							
Organization (Ex. AA-466) †							
Interest and taxes (Ex. AA-466) †							
Franchises (Ex. AA-466)‡							
Total	$21,937,190 00	$22,413,477 00	$22,493,822 00	$22,146,839 00	$23,193,132 00	$24,462,223 00	$25,677,990 00
General office property (Ex. AA-466)	65,173 00	65,199 00	65,224 00	69,772 00	75,280 00	260,977 00	637,436 00
West 57th street property (Ex. AA-466)							
Total	$22,002,363 00	$22,478,676 00	$22,559,046 00	$22,216,611 00	$23,268,412 00	$24,723,200 00	$26,315,426 00
Present Astoria plant and land (p. 11761)	8,219,016 56	10,492,792 18	11,037,789 08	11,649,715 61	12,476,360 99	13,393,278 05	14,324,761 49
Grand total	$30,221,279 56	$32,971,468 18	$33,596,835 08	$33,866,326 61	$35,744,772 99	$38,116,478 05	$40,640,187 49

*Included in above figures.
†None found, a parate from above figures.
‡Actual cost not obtainable, books of original companies not produced.

TABLE IV — RATE BASE FOUNDED ON COST INCLUDING ASTORIA PLANT AND LAND, GENERAL OFFICE BUILDING AND WEST 57TH STREET PROPERTY, WHICH APPELLANTS CONTEND SHOULD BE EXCLUDED — *(Concluded)*

(As of December 31st)

	1913	1914	1915	1916	1917	1918
Land (Ex. AA-466)	$1,944,232 00	$1,733,142 00	$1,696,779 00	$1,696,602 00	$1,671,866 00	$1,653,809 00
Other fixed capital (Ex. AA-466)	23,114,308 00	22,813,285 00	22,365,173 00	22,261,217 00	22,235,195 00	22,508,826 00
Working capital (Ex. AA-466)	910,140 00	900,000 00	830,000 00	870,000 00	1,020,000 00	1,300,000 00
Construction capital (Ex. AA-466)	200,000 00	180,000 00	180,000 00	180,000 00	180,000 00	180,000 00
Engineering, administration, etc., (Ex. AA-466) *						
Organization (Ex. AA-466) †						
Interest and taxes (Ex. AA-466) †						
Franchises (Ex. AA-466) ‡						
Total	$26,168,540 00	$25,626,427 00	$25,071,952 00	$25,007,819 00	$25,207,061 00	$25,642,645 00
General office property (Ex. AA-466)	528,442 04	923,646 08	920,209 64	820,306 76	823,043 76	846,732 20
West 57th street property (Ex. AA-466)			66,904 00	420,564 00	510,744 00	688,998 09
Total	$26,696,982 04	$26,550,073 08	$26,059,065 64	$26,248,689 76	$26,590,848 76	$27,178,375 29
Present Astoria plant and land (p. 11761)	14,587,618 71	14,767,466 28	14,862,643 59	14,970,238 43	15,088,804 75	15,242,633 57
Grand total	$41,284,600 75	$41,317,679 36	$40,921,709 23	$41,218,928 19	$41,679,653 51	$42,421,008 77

* Included in above figures.
† None found, separate from above figures.
‡ Actual cost not obtainable, books of original companies not produced.

341

POINT III

In the years of 1918 and 1919, on which confiscation was based by the Court below, the respondent earned more than a fair return.

For the convenience of the Court we set out here in summary form the findings of the Court as to revenues and expenses in the abnormal years of 1918 and 1919: 342

	1918	1919
Cost of water gas per M cubic feet made at Astoria (pp. 161a; 162a)	$0.39843	$0.43846
Cost of coal gas per M cubic feet made at House A, Astoria (pp. 161a; 162a)	.31537	.4155
Combined cost per M cubic feet sold on basis of 22% coal gas and 78% water gas and with unaccounted for at 4.1% (pp. 161a, 162a, 182a)	.3965	.4519
Cost of distribution (pp. 162a, 167a, 182a)	.1846	.1978
Taxes (pp. 167a, 170a, 182a)	.0628	.0585
Renewals and storage (pp. 171a, 182a)	.0470	.0470
	.6908	.7552
Revenues (p. 182a)	.8721	.8721
Available for profits	.1813	.1169
Net return on basis of sales of 20,000,000 M cubic feet (p. 182a)	$3,626,000	$2,338,000

343

344

Federal Income Tax

The Court upon finding the net income for 1918 and 1919 then reduces that income by the amount of the Federal income tax of 10 per cent (pp. 170a, 182a).

345

The question of the propriety of allowing for Federal income tax was not argued before the Court below by appellants. The Master had refused to make allowance for it and no exception was taken by respondents to his failure to find in this regard. It was not an issue before the Court

below. Consequently, it was with great surprise that appellants found that the Court had made an allowance of over $350,000 in 1918 and over $230,000 in 1919 for this item.

We believe that in view of the manifold questions passed upon by Judge Hand hurriedly in this case he was not able to give this question the consideration it deserved, particularly as he was not aided by counsel. If the matter had been thoroughly presented we feel that he would have found that no allowance should be made for this tax. It is probable that he entirely overlooked the fact that respondent made no claim before him that this tax should be included, nor filed any exceptions to the Master's report excluding it.

In no other case that we can find has an allowance been made by any Court for this tax. It has been generally denied by the various regulatory commissions which have had the matter before them.

1920

Public Service Commission Decisions

Re: *Centralia Gas & Electric Co.* (Ill.), P. U. R. 1920F, p. 124.

Re: *Lafayette Teleph. Co.* (Ind.), P. U. R. 1920A, p. 422.

Re: *Northern Indiana Gas & E. Co.* (Ind.), P. U. R. 1920D, p. 470.

Re: *Indiana General Service Co.* (Ind.), P. U. R. 1920A, p. 489.

Hoffman v. *Elmira Water, Light & R. Co.* (N. Y., 2d Dist.), P. U. R. 1920D, p. 257.

Kane v. *Spring Water Co.* (Pa.), P. U. R. 1920E, p. 803. 351
Verona v. *Suburban Water Co.* (Pa.), P. U. R. 1920F, p. 942.
Re: *Utah Light & Traction Co.* (Utah), P. U. R. 1920E, p. 833.
Bloomsburg v. *Bloomsburg Water Co.*, P. U. R. 1920F, p. 555. 352

1921

Board of Trustees of Lyons v. *Wayne Teleph. Co.* (N. Y., 2d Dist.), Return 23, p. 950, 1921A.
Public Service Commission v. *Pacific Power & Light Co.* (Wash.), Return 24, p. 950, 1921A. 353
Illinois Commission — Re: *Freight Rates of Carriers*, Return 22, 1920A, p. 950.
Re: *Indianapolis Street R. Co.* (Ind.), 1921B, Return 13, p. 922.
Re: *Washington R. & Electric Co.* (D. C.), 1921D, Return 15, p. 922. 354
H. N. Hoffman v. *Elmira Water, Light & R. Co.*, P. U. R. 1921C, p. 410, No. 3.
Missouri Public Service Commission — Re: *St. Joseph Railway, Light, Heat & Power Co.*, P. U. R. 1921C, No. 5, p. 767.
Colorado Public Utilities Re: Leadville Water Co., P. U. R. 1921D, No. 1, p. 173. 355
Pennsylvania Public Service Commission — Borough of Jersey Shore et al. v. *Jersey Shore Water Co.*, P. U. R. 1921D, No. 1, p. 48.

356 *City of Danbury et al.* v. *Danbury & Bethel Gas & Electric Light Co.*, P. U. R. 1921D, No. 2, p. 193.

The Supreme Court of New York State has held that this tax may not be included as an expense. The District Court, Southern District of
357 New York, follows the same rule.

The two cases to which we refer are *Jamaica Gas Light Co.* v. *Nixon*, 110 Misc. 500, and *New York & Queens Gas Co.* v. *Newton et al.*, 269 Fed. Rep. 277.

Mr. Justice Greenbaum, in the *Jamaica Gas Light Co.* case said (507):

358 "The defendants contend that the federal income tax is an excess profit tax, which may not properly be included as an expense to the company. It is the court's opinion that no excess profit taxes may be properly included as an expense. A profit tax in its very terminology implies a tax on profits as such. It is the amount reached after pay-
359 ment of all expenses, and therefore, cannot be treated as an expense. In the returns to the government, upon which the profits tax is based, assuredly the amount of tax is not included in the expenses of the business. The theory of this tax is that he who has secured the profits surrenders or returns a portion thereof to the government. Stated
360 another way, the plaintiff must contribute to the government in common with others from its profits, as such, its share towards defraying the expenses of war. It should, therefore, not be permitted to reimburse itself from its customers because of such contribution."

In *New York & Queens Gas* v. *Newton et al.,* 361
supra, Judge Mayer disallowed such an item, which decision was rendered after the decision of Hand, J., in the instant case.

Moreover the very cogent and well reasoned decision of District Judge Hutcheson in *Galveston Electric Co.* v. *City of Galveston,* 272 Fed. Rep. 147, 162, seems to be conclusive on this point. 362
The Court there said:

> "The seventh exception of the defendants goes to the allowance of income tax, and neither counsel have cited me to any decision by the Supreme Court on this point and outside of the opinion of Judge Hand in 267 Fed., supra, I have found no Court 363
> expression on the subject.
>
> "It is therefore, as far as this Court is concerned, an open matter and I am of opinion that no reasonable theory permits its allowance. Doctrinaires and writers upon tax subjects all agree that the income tax is designed to bear directly upon the subject in such a way as that its incidence can- 364
> not be shifted to others. In view of the steadily rising complaint against these taxes as in part responsible for higher costs, because their incidence is shifted to the general public I would be rash, where not compelled to, to undertake to decide whether in practise the theory of the doctrinaire works out; but I think it cannot be doubted that it
> was the purpose of the states in adopting 365
> the amendment to the Constitution, and of Congress in imposing the tax, that the tax should operate directly as a charge against ascertained earnings, and not in any sense to be a direct tax on property, and it was anticipated and supposed that persons sub-

366 ject to it should have their earnings diminished to the extent of this tax. * * *

"Certainly the Constitution does no more than to say to the complainant that the Legislature cannot force it to operate at such rates as will deprive it of a return similar to that enjoyed generally by enterprises in that community. The basis of the rate of
367 return is arrived at by analogy to earnings of other enterprises in the community, all of which on their 8 per cent. return pay income tax. It certainly cannot be that the Courts, in declaring that a right to a fair return could not be abridged, intended to create a more favored class out of public utility concerns, so as to allow them to receive their 8
368 per cent. free of income tax, while all other persons in the vicinity who receive the same per cent. have to pay it."

Earnings in 1918 and 1919 Without Deduction for Income Tax

As there should be no deduction from revenues
369 because of income tax it will be interesting to note here the actual per cent of profits on the theories and under the principles adopted by the Court below without that deduction.

	Earnings	Value of Tangible Property (Record p. 181a)	Per Cent Return Thereon	Value of Tangible Property Plus Franchises (Record pp. 38a, 147a, 181a)	Per Cent Return Thereon
1918	$3,626,000	$64,196,533	5.648	$72,977,533	4.968
1919	2,338,000	64,196,533	3.626	72,977,533	3.203

370 That is to say, even on the Court's erroneous theories this company after a long period of unexampled prosperity was able — so profitable is its business as lighting monopolist — to show a return of nearly 6 per cent on its tangibles in the extraordinary year of 1918 and of practically

5 per cent upon its tangibles plus its intangibles. 371
In 1919, the year of post-war inflation, the profits as found by the Court are 3.6 per cent on tangibles alone and 3.2 per cent on tangibles plus franchises. Even if this was all the return, which it was not, we contend that this return was sufficient when it is considered how abnormal was the period and how fleeting the inflated 372 prices.

Any loss of return to respondent caused by selling gas to the City of New York at the statutory rate of 75 cents per thousand cubic feet, as fixed by Chapter 736 of the Laws of 1905, should be excluded from consideration 373 *in determining the validity of this statute.*

By chapter 736 of the Laws of 1905, the Legislature of the State of New York fixed the maximum rate for gas furnished or supplied to the city of New York, at 75 cents per thousand cubic feet.

This statute is in no way attacked by the 374 respondent in this action. For the purpose of deciding the cost of production and distribution of gas to the private consumers of respondent, it is clear that any loss of earnings sustained by the company in furnishing gas to the city of New York at the statutory rate of 75 cents per thousand cubic feet of gas should not be thrust upon 375 private consumers, nor in any degree enter into the determination of the question, as to whether the statute here under review is confiscatory.

It appears from respondent's Exhibit AA122, p. 18171, that during the year of 1908, 117,455,000 cubic feet and during the first eight months of

376 1919 (Ex. 355, p. 16591), 69,556,600 cubic feet were sold to the city for municipal lighting pursuant to chapter 736 of the Laws of 1905, which statute is not attacked here.

It is urged in the interest of the consumers of respondent that for the purpose of determining the validity of this statute the consumers should
377 be credited with the sale of gas sold to the city at the same rate that they themselves are obliged to pay in order that any loss in earnings occasioned by selling gas to the city at its low rate fixed by the statute not in question here may not in any degree prejudice the cost to the consumer. To the operating income of the years 1918 and
378 eight months of 1919, should be added 5 cents for every thousand cubic feet sold to the city.

This question arose in the case of the *New York & Queens Gas Co.* v. *Newton et al.*, 269 Fed. Rep. 277, and was passed on by Judge Mayer in his review of the report of the special master in that case as follows:

379

> "7. If the figure of 99.51 cents representing the average selling price of gas taken, then the deficiency is 1.78 cents per thousand cubic feet of gas delivered. The figure of 99.51 cents results from the fact that under the statute, plaintiff is required to deliver gas to the city of New York, as a municipality at the rate of 75 cents. This
> 380 rate has not been attacked by suit. The city in its corporate capacity is entitled to have gas furnished to it at a lesser rate than the private consumer. This fact, however, does not afford any reason why the private consumer should make up the deficiency caused by the lower rate of 75 cents to which the city of New York is entitled. In other words,

the fact that the average selling price of 381
plaintiff's gas is 99.51 cents is irrelevant to
the ultimate question in the case. In deter-
mining whether the statute is confiscatory
the inquiry must start with the proposition
that plaintiff under the statute may charge
the private consumer (as distinguished from
the municipality) $1.00 and then the ques-
tion is whether the cost of production and 382
distribution is in excess of that dollar."

The following table will readily give the amounts to be credited:

	Gas sold city cubic feet	Credit at 5¢ per M cubic feet
Year 1918	117,455,000	$5,872 75
First 8 months of 1919	69,556,600	3,477 83

383

We have not in the following tables credited these amounts. The rate of return to respondent will necessarily be slighty increased thereby.

384

Uncollectible Bills

The item for uncollectible bills amounted to $95,330.22 (Ex. 205, p. 16338) in 1918, and for 1919 (first eight months) the sum of $47,535.08 (Ex. 365, p. 16630). These items, like all the rest, had no firmer foundation for their allowance than the books themselves which we contend were 385
improperly admitted.

But passing that question for the time being, there ought not to be any allowance whatsoever for uncollectible bills in a confiscatory case.

The Transportation Corporations Law of New

386 York State (section 63) authorizes respondent to require:

> "* * * every person to whom such corporation shall supply gas * * * for lighting any building, room or premises, to deposit with such corporation a reasonable sum of money according to the number and
387 size of lights used or required or proposed to be used, for two calendar months, by such person, and the quantity of gas * * * necessary to supply the same, as security for the payment of the gas * * * or compensation for gas consumed * * * to become due to the corporation, * * *."

388 The respondent, unless the deposit was made as required by the above section, might cut off the supply of gas to the consumer, or refuse to serve him.

Section 65 of the Transportation Corporations Law.

389 The courts of said state have even gone so far as to hold that a gas company may cut off the supply of gas to a consumer who neglects to pay, although he may have made a deposit as security.

Hearsey v. *Queens Borough Gas Co. & Elec. Co.*, 47 Misc. 375.

390 Here the company is authorized by statute to obtain in advance a deposit to cover gas to be thereafter sold to the consumer and the practice of the company is to take such deposits. In other words, it may if it chooses have its money in advance. It is a protection not ordinarily

afforded other business. At least with this safe- 391
guard enacted for its benefit, the burden was upon respondent of showing that it used more than ordinary diligence in its effort to collect its gas bills, and this ought to appear before any allowance is made for such item.

All that we have here is the inclusion of a sum for uncollectible bills without any competent 392
proof showing diligence on the part of the respondent to collect the amount from its consumers or any reason why it failed and neglected to exact a deposit. There is a lack of proof sufficient to warrant the Court in allowing any sum for this item. While, on the contrary, we think, in view of the statute quoted, and the safe- 393
guards surrounding respondent in the sale of its gas, there ought not to be any allowance in any case of this kind for uncollectible gas bills.

Respondent has something better than a cash business. It may obtain its money in advance and place it on deposit to await the day when it furnishes gas. It may then reimburse itself out of 394
the consumers' money. There ought not to be any loss to the company by failure of a consumer to pay and if there is, it is because of the company's neglect.

The above amounts should therefore be eliminated from operating expense in 1918 and in 1919.

395

Manufacturing Expenses in 1918 and 1919

We shall point out, the Court below was far too lenient in its treatment of respondent's manufacturing and distribution expenses.

It is the claim of appellants that the close corporate relations between respondent and the Standard Oil Company, its sole purveyor of

396 the principal ingredient of water gas, has prevented the proper development of its gas manufacturing system and has led to waste of many kinds. In other words, we contend that in order to give large and advantageous contracts to the Standard Oil, the respondent has not only built large water gas plants when coal gas plants would
397 have been more economical, but that in its operations it has pushed its water gas production and retarded its coal gas production in the face of conditions that were making coal gas progressively cheaper to manufacture than water gas. We also claim that the contracts made for gas oil were not reasonably or economically made,
398 but on the contrary were the results of dealings between corporations having interlocking directorates, stock ownership and close business relations detrimental to the consumers.

As to the actual intercorporate relations between the greatest gas company and the greatest oil company in the country, if not in the world,
399 the proof is of necessity somewhat meager. The acquirement and the actual fact of control of a large corporation depend on so many considerations of finance, banking arrangements and other things and stock control itself that it is not to be expected that the actual relations could be revealed by ascertainable facts of record.

400 The following, however, does appear:

Walter R. Addicks, one of the trustees and one of the vice-presidents of respondent (pp. 3774–3775, fols. 11322–11323), testified that since 1904 he had charge of the purchase of gas oil for respondent, and that for the past six or seven years the purchases of the respondent embraced

the oil requirements of all of the gas companies affiliated with respondent company, with the exception of the New York Mutual Gas Light Company (p. 3778, fol. 11334). 401

It appeared that since the time of the prior suit, if not before, respondent had purchased, and was at the time of this suit, purchasing all of the gas oil required by it and its affiliated companies from the Standard Oil Company of New Jersey. 402
It further appeared (p. 3798) that Mr. William Rockefeller is one of the trustees and a member of the executive committee of respondent, and that he is a "substantial" stockholder in the Standard Oil Company of New Jersey (pp. 9896–10334, fols. 29686, 31000). It also appeared that Samuel Sloane, another of the trustees of respondent, was a stockholder in the Standard Oil Company of New Jersey (p. 9901, fol. 29702), and that Mary J. Addicks, wife of said Walter R. Addicks, was also a stockholder in the Standard Oil Company of New Jersey (p. 10339, fol. 31017); and that John Stearling, who up to the time of his death in 1916, had been a trustee, and general counsel to respondent, also held stock in this oil company (p. 10341, fol. 31021). Beyond this, it can be "assumed" as the Court below has said (p. 153a), "that there is also some common stock ownership," disclosed and undisclosed by the record. 403 404

But supplementing this indication of identical corporate control and indeed confirming it beyond question are the facts of respondents' general course of action, which can bear but one interpretation. 405

In the first place, we have the undoubted fact

406 that respondent has been for years and is to-day entirely at the mercy of the Standard Oil Company of New Jersey, and that it never has and never would consider purchasing oil from any other company than this one oil company. It is true that in November and December, 1918, just prior to the commencement of this suit, Mr.
407 Addicks wrote certain perfunctory letters to the Standard Oil Company of New York, the Atlantic Refining Company, Gulf Refining Company, the Sun Company, The Texas Company, and the Tidewater Oil Company, inviting bids from those companies for the supply of all or any part of the requirements of the respondent and affiliated companies. Something of the same nature was
408 done in November, 1917, and these letters were placed in evidence (Exhibits 291–302, 308–316, pp. 16469–16478, 16486–16491). An examination of them clearly shows they were not intended to invoke *bona fide* bids, and that there was no expectation on the part of Mr. Addicks or respondent that they would result in obtaining such
409 bids. In fact, though Mr. Addicks would not, of course, admit that these letters were written perfunctorily, yet his attitude appears very plainly in the following colloquy which occurred toward the end of his cross-examination (p. 4180):

> "The Master: Have I not put it accurately, Mr. Addicks — because if I have not
410 I want you to correct me. I get the impression from your testimony, both the direct and cross as far as it has gone, and this correspondence, that you had no faith in these outside companies meeting your requirements in the way you wanted, that you felt you had to deal with the Standard Oil Com-

pany because of the position they had, the facilities they had, and their ability to produce the stuff — that you felt you were getting it at as good a price as you could anywhere else anyhow? 411

The Witness: And the fact that they never failed.

The Master: Am I not right in that, about your testimony? 412

The Witness: I think that is true."

* * * * * *

By Mr. O'Brien:

"Q. Is the Master's summary or the Master's impression of what was in your mind during these years from 1913 to 1919 when making oil contracts correct? A. I do not think of any other company than the Standard Oil Company could supply our wants. 413

Q. Did you think that at the time you were negotiating these contracts? A. I have thought that for a number of years, and during the time I negotiated these contracts.

Q. Then your letters to the Sun Company, the Texas Company, if you wrote any of them, the Gulf Refining Company, the Tidewater Company, were perfunctorily done? A. No, they were not perfunctorily done. 414

Q. Why did you write to them, then, if you had that conviction about the Standard Oil Company that you have referred to? A. *To absolutely confirm that fact*" (pp. 4180–4181, fols. 12538–12539, 12541–12542). 415

There was no real endeavor to obtain oil from competing companies.

The Court below has examined the contracts so made with characteristic care and painstakingly compared them with other contracts made

416 in New York and neighboring territory (p. 153a-156a). It has, however, fallen into fundamental error in its comparison, in that in comparing the contracts it has considered one element alone, that of price, and has overlooked consideration of all other elements, particularly the very important element of the period covered by the
417 various contracts.

For instance, for the year 1914, the respondent had a contract for gas oil at about 5 cents per gallon (Ex. 335, p. 16540). On July 1, 1914, this contract was cancelled and a new one entered into for a period of two and one-half years at the reduced price of 3 to 3.1 cents per gallon (Ex. 336, 337 p. 16543). Of course this can spell nothing
418 but a sudden and excessive over supply of oil at this time. And this oversupply was not confined to the Standard but we find the Public Service Gas Company of New Jersey and the Equitable Illuminating Gas Light Company of Philadelphia both entering into similar advantageous contracts with other oil companies at the same
419 time. The vital distinction, however, and one that the Court entirely loses sight of is the fact that while respondent contracted at this low price for 2½ years each of the other large companies contracted at the low price *for a five year period extending to the summer of 1919.*

The Public Service Company cancelled a con-
420 tract calling for barge deliveries at Jersey City at 4½ cents and made a new contract at a price of 3.05 cents for similar deliveries (Exhibits AA60, AA61, AA62, pp. 18002, 18005).

The Equitable Illuminating Company of Philadelphia cancelled a contract at 4.4 cents running

to December 31, 1915, and entered into a new contract at 3 cents for five years (Ex. AA67, AA68, pp. 18012, 18014). 421

Of course, the reason is not far to seek and the indications of intercorporate relations and the confirmed predilection of respondents' purchasing agent for the Standard are amply sufficient to account for it. With a prevalent enormous oversupply of gas oil the gas companies of course had the upper hand in bargaining with the oil companies. 422

The New Jersey and Philadelphia Companies could say to the Gulf Refining Company, "If you will give us a contract at 3 cents for five years we will deal with you. Otherwise we will deal with your competitors." But the respondent could not say any such thing to the Standard. The Standard knew better. It knew that any contract short of a scandal would be signed and that Addicks would not dare go before the masterful Rockefeller with a proposition to buy from another company. Mr. Addicks on the stand summed it up very well. He said: (p. 3962) 423 424

"Q. Why did you not make a ten year contract at that price? A. Make a ten year contract?

Q. I will be modest — make a five year contract, then and there?

Mr. O'Brien: They made a ten year contract with Barrett, why not here? 425

A. I moved them up from six months to a year.

Q. Why did you not move them up to a five year contract, or ten, either one, you take your choice? A. I think I went the limit with what they would give.

426 Q. Did you try to get them into a five year contract? A. I think I inched from six months to a year or two years, or from a year to a year and a half or two years, I do not remember which. I think the proposition originally was not to exceed one year and I got two, to the best of my memory.

Q. You know something about the Boston
427 Consolidated? Well, did you try to get them to give you a five year contract? A. I tried to get them to give me as long as they would give me. I cannot say a five year contract. Two years is all they have given me."

It is clear from this that Addicks was in a position where he could beg but could not threaten.

428 The contracts with their dates, terms, prices and quantities are summarized as follows:

	Date	Price (cents)	Period	Quantity (gallons)
Respondent	Aug. 17, 1914	3 to 3.1	2½ years	275,000,000
Public Serv. Gas Co.	Aug. 5, 1914	3.05	5 years	252,000,000
Equitable G. L. Co.	Sept. 24, 1914	3.00	5 years	125,000,000

(Ex. AA62, AA68, 337)

429

At any rate, it is sufficient to say that the respondent by reason of its intercorporate relations with the Standard was so hobbled in its negotiations for oil in time of plenty that it could make only half as good a contract for oil as could its neighboring companies who were not so hobbled.

430 Nor was this the only occasion on which the same causes brought about the same results. On September 29, 1916, the great Boston Consolidated Gas Company was able to make a contract with the Gulf Refining Company for five years commencing April 1, 1917 at prices from 3.625 to

3.875 (Exhibit AA252, p. 18410). The respondent contract for 1917 was at a price of 5 cents (Exhibit 290, p. 16467). 431

Of this Boston contract, the learned Court below says:

> "This alone of all the contracts offered appears to show very substantial divergence which is not accounted for" (p. 156a). 432

Again, in 1919, there was apparently an oversupply of gas oil, for in March of that year the Consolidated Gas Company contract at 7.5721 cents made on December 18, 1918 (Ex. 303 p. 16478) was cancelled and a new contract made at 6.0721 cents (Exhibit 304, p. 16482). On June 21, 1919, the New Jersey Company, which had been getting oil at 3 cents ever since 1914, while the respondent had gone as high as 7½ cents, made a new contract for the year beginning August 1, 1919 at 5 cents at Jersey City (Exhibit AA63, p. 18007) and on September 30, 1919, the Philadelphia Company, which had also purchased at 3 cents from 1914 made a new contract at 3.95 cents (Ex. AA65, p. 18009) as compared with the Consolidated's 6.08. 433 434

So that these large companies near New York were always able to bargain more freely and get better prices than respondent. The results are sufficiently startling as shown by the following statement of the prices paid for gas oil by the Consolidated as compared with the prices paid by the New Jersey, Philadelphia and Boston companies for the years 1914 to 1919 inclusive, with a calculation of the yearly savings to respondent 435

436 if it had purchased at the average prices of the other three companies.

	Consolidated Price per gallon Ex. 326 p. 1651? Opinion Record p. 156a as to 1919	New Jersey Price per gallon	Boston Price per gallon	Philadelphia price per gallon	Saving to Consolidated if it had purchased at average price of other three companies
1915.....	.0025	.036	.....	.02	$2,276 10
1916.....	.0035	.036	.....	.02	2,068 01
1917.....	.0398	.036	.0285	.02	512,509 68
1918.....	.0856	.036	.0285	.02	1,187,826 70
1919 to 437 Aug. 1..	.068	.036	.0285	.025	600,681 05

Accumulated saving $2,302,373.54

The loss to respondent of the figure of $2,302,373.54 may therefore reasonably be said to be due to the reasons heretofore assigned, namely: The lack of business foresight and sagacity of respondent's purchasing agent, combined with the interlocking directors, stockownership and close business 438 relations between respondent and the Standard Oil Company of New Jersey.

The court below holds that this amount should be borne by the consumers. Appellants contend, however, that since it is attributable to the stockholders they alone should bear the loss. They 439 have elected the directors and the directors in turn retained the services of the purchasing agent; consequently, they should bear the burden and not the consumers, who have nothing to say in the matter.

We submit that in all justice and fairness the amount charged for gas oil in 1918 and in 1919 should not be more than the average price paid 440 by the three similar companies in New Jersey, Philadelphia and Boston heretofore referred to.

Consequently the average price of gas oil to the Astoria Company in 1918 should be taken as $.033 per gallon. This would reduce the court's figure for water gas in 1918 of $.39843 and in

1919 of $.43846 to $.26962 and $.31089 respec- 446
tively. The court's coal gas costs in 1918 of $.31537 and of $.4155 in 1919 would be reduced to $.28184 and $.38052 respectively.

Nor does the sinister influence of the Standard Oil Company upon respondent's operations rest upon or end with the question of oil prices. In fact, more conclusive proof of it and very damag- 447
ing results from it, though more difficult of determination, are found in the unexplained failure of respondent to turn to coal gas instead of water gas both in building new units and in the use of those it has.

There can be no question from a reading of wit- 448
ness Addick's testimony above noted (p. 4180) that for the respondent there was only one oil company, The Standard of New Jersey. If it were true that this company was the only one equipped to handle respondent's requirements and that was the sole reason for dealing only with that company surely it was the part of common sense to throw out an anchor to windward in the 449
shape of an alternative method of making gas. No judicious aggregation of real American business men would allow a great business to get into the predicament of having to depend upon one company for the principal ingredient of its manufactured product. No prudent men running such a great business upon which so many hundreds of thousands of innocent people depend 450
for the necessaries of life, would allow the business to be at the absolute mercy of this great oil monopoly.

If respondent's managers had been prudent and had been courageous and far sighted they

441 would long ago have built adequate coal gas units for use when the exactions of the Standard Oil became too great. They would, moreover, have kept such coal gas units up to date and used them to the limit in the era of high oil prices.

But neither of these things did they do. Instead of an adequate coal gas equipment we find the 442 Consolidated system (Exhibit AA132, p. 18129) in 1919 with a capacity of only 33,300 M cubic feet per day of coal gas as compared with a capacity of 137,950 M cubic feet per day of water gas.

Of this paltry coal gas equipment nearly one-third, the 14th and 42d Street plants, capacity 443 9,500 M cubic feet daily, were allowed to become so antiquated that the little gas made at them in 1916 cost more than $34.20 per M (Ex AA131, p. 18121) and the court below felt constrained to eliminate them entirely from the property upon which respondent was found to be entitled to a return (p. 173a).

444 But when we come to the insignificant use of the coal gas plants as compared with the water gas plants the results are even more surprising.

In commenting on the meagre use of the coal gas equipment at Astoria the witness Little, called by the appellant District Attorney, testified (pp. 11189–11231) that the make should be far greater than it is and as to the costs under efficient 445 operation. As to the actual operation under respondent's chief engineer Woods he said (p. 11360).

> "I do not think Mr. Woods is given a free hand as to the plants he can run. There is somebody higher up telling him what to do. I cannot conceive of Mr. Woods having, as

they claim, the best plant in the United States and running it at 50 per cent capacity." 451

Mr. Little testified that the coal gas plants at Astoria should produce, if properly run, 6,279,070 M cubic feet per annum (pp. 11205-11206). As to this the court below says:

"It is quite clear that the supposed optimum of Little is far beyond any practical possibility and should not be taken as a standard" (p. 161a). 452

Yet these very coal gas plants in 1914 when oil was it its lowest made a total of 5,769,142 M cubic feet, very near Little's "optimum" (Ex. AA133, p. 18131). 453

The court below has found (pp. 162a) that even with the meagre and expensive use of these coal gas plants in 1918, the cost per M of coal gas was $.083 less than that of water gas [coal gas, House A $.31537; water gas, House C $.39843; difference $.083]. The difference would of course have been much more in favor of coal gas if more had been made. Yet in this year only 3,068,000,000 cubic feet was made instead of the 5,769,142,000 cubic feet made when oil was low in 1914 (Ex. AA133, p. 18131). 454

Mr. Woods was hard put to it to explain the reasons for this small output of coal-gas.

He first explained (p. 5063, fols. 15185-15189), why they had erected both a water gas and a coal gas plant at Astoria. 455

"Q. Is it not a fact that you started an all coal-gas proposition over there in 1906 because you wanted to get away from this high

456 price of oil? A. We wanted to combine water-gas and coal-gas plant so we could take advantage of both conditions.

Q. It was an idea of keeping an anchor to windward, was it not? A. Absolutely, it was —

Mr. Ransom: Let him finish the answer.

The Master: Yes.

457 The Witness: So that to a certain extent with the change in the price of oil and the change in the price of coal, we to a certain extent could take advantage of those changes, and operate under the most favorable conditions for the company and for the consumer. It was with the idea it would be a benefit to the company by having a certain
458 amount of coal-gas installation (p. 5063, fols. 15187-15189)."

While under cross-examination it appeared by Exhibit AA-133 (p. 18131) that instead of taking advantage of having the two kinds of plant to increase the output of coal-gas and decrease that of water-gas as oil went up the tendency
459 had been in the other direction, the make of the two kinds of gas being as follows:

	Price of Oil (Ex. 326, p. 16512)	Coal Gas (AA133, p. 18131) M cu. ft.	Water Gas (AA133, p. 18131) M cu. ft.
1914	$0 03981	5,769,142	4,969,034
1915	03035	4,584,608	5,543,604
1916	03035	3,033,565	6,163,400
1917	04988	3,079,736	6,162,386
1918	06565	3,072,004	6,682,772

460

Mr. Woods attempted to explain this as follows:

"Q. As a matter of fact, with the cost of your water gas increasing more rapidly than

the cost of your coal gas, your company steadily, the last year or two, has been increasing the manufacture of water gas and decreasing the manufacture of coal gas, has it not? A. We have made the gas dependent upon the coal conditions and labor conditions. If we could get the coal and could get the labor, we made as much coal gas as we could make, as we could possibly make under the conditions under which we were operating. That was the only thing that kept us from it. There were periods of time when we could not get coal and there were other periods when we could not get labor. During 1918, the United States Government was using part of our coal-gas plant and were anxious for us to make water gas as a matter of toluol production. They were using a part of our coal-gas plant for the purpose of making a carbon for the gas masks to be used on the other side, with the request that we make as much water gas as we possibly could. 461 462 463

Q. That was the year of our entry into the war, 1917–1918? A. They worked both in 1917 and 1918. We were short of coal at some times. 1918 showed a reflected condition as to the coal as compared with water gas, and the condition as of today is just the reverse. 464

Q. All those conditions arose because of the war—all that you have named certainly did? A. I suppose the war had something to do with it, naturally.

Q. Then why did you start to increase your water gas manufacture steadily in every plant and decrease your coal gas manufacture steadily in every plant—a process that never let up until today—five years before the war started? A. Because of our ina- 465

466 bility to dispose of coke was one reason, and the inability to maintain candle power, and if we had gone ahead and made large quantities of coal gas and not been able to dispose of the coke. To maintain candle power, that was the only reason " (p. 5684, fols. 17053-17054).

467 As to the inability to dispose of the coke in the greatest city in the world he was questioned further as follows:

" Q. But notwithstanding the difficulty that you have had to market your own coke there have been a good many times when you have had to go and buy coke from other people yourselves? A. We have, due to our
468 inability to get coal at the same time, soft coal, so that we could make our own coke. In the spring of 1917 — I think it was in March, 1917 — where we ordinarily ought to have one hundred and twenty-five or one hundred and fifty thousand tons of bituminous coal on hand we actually had seventeen thousand tons on hand, which was only good for
469 about twelve days."

" Mr. O'Brien: You mean 1918 or 1917?

The Witness: I mean in the spring of 1917. That was the year. The difficulty is we are buying coal on the market this year and last year there was an inability to get coal."

" Q. You bought coke this year, did you not? A. Yes, we bought coke this year.

470 Q. You bought it practically every year, did you not? A. No, we do not.

Q. You bought it this year? A. We bought it this year.

Q. You bought some last year? A. We bought it last year, yes (p. 5693, fols. 17078-17079)."

Instead of trying to sell coke they actually 471
bought it and it is quite plain that in 1914 when respondent made 5,769,142,000 cubic feet of coal gas it disposed of its coke. Why could it not do so in 1918?

Mr. George W. Doane, President of the National Coal & Coke Company testified (p. 14109, fol. 42326) that "five years ago" they 472
sold "125,000 tons;" in one year that now they were selling at the rate of only about 50,000 tons per year, but admitted (p. 14109, fol. 42327) —

> "We could sell more, if we had a constant uninterrupted supply. The amount we are selling now is as much as the Gas Company can part with at the present time." 473

As to the candle power, this, of course, does not change with the years. The proof was that the low-candle-power coal gas was mixed with high-candle-power water gas made at Astoria and at the neighboring New Amsterdam plant.

If the Astoria Company could enrich 5,769,- 474
142,000 cubic feet of coal gas in 1914 when only 4,969,034,000 cubic feet of water gas was made there, and only 4,007,878,000 cubic feet of water gas was made at the New Amsterdam plant, it could certainly enrich a similar amount in 1918 when 6,682,772,000 cubic feet of water gas was made at Astoria and 6,222,402,000 cubic feet 475
made at the New Amsterdam works (Ex. AA-133, p. 18131).

So that the candle power difficulty which Mr. Woods finally said was "the only reason" for not making a large quantity of coal gas when it was advantageous to do so, is not very impressive.

476 Certainly under these circumstances it is most unjust to the consumers to take as a measure of the cost of coal gas the costs appearing at the Astoria plant in 1918 and 1919. The coal gas plants should have been operated to a much greater capacity and the cost per unit correspondingly reduced.

477 The reasonable cost of manufacture under reasonably efficient conditions and with proper loads carried by the coal gas method is of course somewhat speculative. Mr. Little testified at length in regard to it and his figures per M made were $.28 for coal gas and $.396 for water gas in 1919 (pp. 11212 and 11227).

478 The Court below makes criticism of his figures on the ground that he took a lower price for oil than that actually paid and that certain other items, mainly repairs are too low in his calculation (p. 161a).

The Corporation Counsel whose witness Mr. Little was, has gone quite fully into this question in his brief and we will not attempt to add any-
479 thing further to his full justification of Mr. Little's figures.

Suffice it to say here that they are the only figures in the case showing the results of a full year's operation at 1919 prices of the Astoria coal gas plant so managed as to put out a reasonable amount of gas. If some slight criticisms
480 may be made of them yet they are by no means as faulty as the figures adopted by the court and master below for 1919. These figures are open to numerous vital objections.

In the first place they are figures covering an eight months period. As is indicated graphically

by Mr. Little (p. 11204) the spring and summer demand are lower than the fall and winter 481
demand. Or more accurately, there are two seasons of high demand and consequent low costs during the year, namely, from January to April and from September to December. The intervening months, May to August are months of low demand, of low output and consequently of high costs. So that in taking figures for eight 482
months only instead of for one year the Court below necessarily balanced one period of low costs and one period of high costs while in a normal year there are as we have seen two periods of low costs and only one period of high costs.

Moreover, the figures at the Astoria plant in 483
1919 have apparently been manipulated for the purpose of this case. The most glaring proof of this appears in the price obtained for the chief residual of coal gas, namely, coke. About 1,500 pounds of coke is obtained from each 2,000 pounds of soft coal carbonized (p. 11706). This coke is used as generator fuel in place of anthracite coal 484
in water gas manufacture or for other purposes and Mr. Woods stated that to make a given quantity of gas required about 5 per cent to 8 per cent more coke than anthracite coal (p. 5604, fol. 16811). The price of coke, therefore, should and does vary in the open market with that of anthracite coal 485
(pp. 14139, 14158). As appears from Sangster's tables a great quantity of the coke thus obtained from coal gas manufacture is taken right to the water gas plant and there used as generator fuel (pp. 11721, 11707). So that the higher the price

put upon this coke the greater will be the credit to coal gas and the lower its cost of manufacture. Coincidentally, of course, the cost of water gas at Astoria will increase but not to such an extent as the cost of coal gas will decrease because as shown by Mr. Sangster only about half or 7/12 of the coke produced is used at Astoria, the remainder being sold to the Consolidated and other companies (p. 11707).

Consequently, the price at which coke is sold or credited to coal gas and debited to water gas is not only of vital importance in showing the comparative costs of coal and water gas but since the price is fixed not in the open market, like coal, but by the company and for the company its fixation furnishes an unexampled opportunity for manipulation. By selling coke cheap to the Astoria, the Consolidated and particularly to the affiliated companies, the following results are obtained:

1. The cost of coal gas becomes dear as compared with water gas, which tends to justify the meager use of coal gas and to offset and partially conceal the enormous losses from the improvident oil contracts.

2. The sale of large quantities of cheap coke to the affiliated companies other than the Consolidated tends to decrease the costs of those companies at the expense of the Astoria and the Consolidated, thus tending to insure the success of this the pioneer litigation. These being the ends to be gained, it is interesting to note what was done which appears in the following summary:

	Average cost of gross ton of anthracite coal (a)	Average price of gross ton coke (b)	Cost of bituminous coal per M coal gas made	Received for coke per M made (d)	Net cost of coal per M coal gas made	Cost of generator fuel per M water-gas made (e)
1918	$6.69	$6.54	$.46413	$.40730	$.05683	$.10069
8 mos. 1919	7.79	6.27	.55805	.3977	.1423	.10445
Increase (I) Decrease (D) %	I 16.4%	D .4%	I 22.7%	D .58%	I 256%	I 3.73%

491

If the price of coke had gone up with anthracite coal 16.4 per cent as it should the resultant credit to coal gas in 1919 would have been $.47410 instead of $.3977 as given above and found by the Court. This would reduce the cost of coal gas by $.07640. If the cost of generator fuel for water gas were similarly increased 16.4 per cent, this would make the cost in 1919 $.11720 per thousand. This would mean an increase in water gas cost of $.01275 per thousand over the figure found by the Court.

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493

Applying these figures to the coal gas cost of $.38052 per thousand and the water gas cost of $.31089 per thousand given above (p. 93) gives us a figure of $.30412 per thouasnd for coal gas in 1919 and $.32364 per thousand for water gas.

This is not by any means the only particular in which the 1919 figures of the Astoria plant are open to vital criticism.

494

The amount of coal used, both water and coal gas manufacture at Astoria in these years point irresistibily to inefficiency.

Note.— (a) Exhibits 364 and 365, pp. 16626, 16630; (b) Exhibits 485 and 486, pp. 17414, 17420. The prices given in these exhibits are for 100 lbs. of coke. These prices are multiplied by 22.4 to obtain the prices above noted for a gross ton. (c) Sangster, p. 11749; (d) Sangster, p. 11750; (e) As 36.43 pounds were used in 1919 as compared with 35.3 in 1918 (p. 160a). This entire increase is due to this excessive use of generator fuel, the use of anthracite coal being practically nil in 1919. The figure given by Sangster is .10445 (p. 11748) but the court has found the use excessive and deducted .9 cents, a very moderate deduction, which, however, we adopt for this purpose.

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496 Thus the average use of generator coal and coke for water gas at the Manhattan plants of the Consolidated from 1909 to 1917, non-rate case years was only 30.85 pounds per thousand made. At Astoria it was 35.3 pounds in 1918 and 36.43 pounds in 1919 (Exhibits AA299, AA398, 497 AA399; pp. 18532, 18646, 18672; Court's opinion, p. 160a.

The average use of bituminous coal at the old dilapidated 14th and 42d Street plants during the years 1909 to 1915 was only 188.39 pounds per thousand made (Exhibits AA396, AA397; pp. 18592, 18620).

498 Mr. Woods testified that 200 pounds was sufficient (Ex. 354 for Identification, p. 16590). The Astoria use in 1918 was 207.6 pounds and in 1919 211.5 pounds.

As to this the Court below said:

> "These figures (207.6 and 211.5) seem too large and would have been so in the earlier 499 years, but Mr. Little himself thought Woods' estimate too low at the present time and insisted that 207 pounds was necessary" (p. 160a).

We find nothing in the record to bear out this statement of the Court and believe the learned Judge must have been mistaken. Possibly he 500 was misled by the fact that Mr. Little testified that 207 pounds of bench fuel per ton of coal carbonized was too low (p. 11216).

As a matter of fact, Mr. Little testified that soft coal such as the Astoria plant used should yield 5.5 pounds of gas per pound which would give a use per thousand of 181.81 pounds (p. 11195).

We will, however, pass these over and ask for no deduction though the excesses are so great and the evident manipulation of figures so striking that we contend that the Court below committed grievous error in basing any conclusion on them. 501

We will content ourselves, in liberality to respondent, with the deductions above noted. We think there can be no question, however, in view of what has been set forth above, that the meager use of coal gas for the benefit of the Standard Oil Company should not receive the sanction of this Court. The Court below was so impressed by our contention in this regard that its original calculations as to production expenses were made both on the basis of 22 per cent coal gas and 78 per cent water gas and on the basis of 50 per cent of each (pp. 160a, 161a). In reaching its final figure, however, it abandoned the latter and more reasonable and efficient proportion for the one which we contend benefited the Standard Oil Company (p. 182a). This we contend was error. Whatever is or may be done in regard to the excessive costs of coal gas by reason of insufficient use of the coal gas method certainly the ratio of 50 to 50 should be adopted as proper. 502 503 504

Taking this ratio then and figuring unaccounted for gas with the Court below at 4.1 per cent gives us a combined price per thousand sold in 1918 of $.2875 and in 1919 of $.3273 and a saving over the Court's figures of $.1089 per thousand in 1918 and of $.1246 per thousand in 1919. This on the basis of sales of 20,000,000,000 per annum gives the saving of $2,178,000.00 in 1918 and $2,492,000.00 in 1919. 505

506 *Distribution Expenses.*

Under this heading the Court below has grouped all expenses after manufacture with the exception of renewals, storage and taxes (p. 162a).

As to all of these expenses we contend the Court labored under one vital misconception.

507 The Master's figure and respondent's for these items was $.1978 for 1918 and $.2110 for 1919 per thousand (p. 57a). The Court made some obviously necessary deductions which reduced these figures to $.1802 and $.1934 respectively (p. 166a). He calls his treatment "severe" but we must respectfully except to this characterization.

508 As to these items, particularly, respondent's proof was really worthless. There was no basis for a finding except the general books of account and accountant Teele's tabulations of them. Moreover, so complicated are the inter-relations between the various companies in the system, so much depends on arbitrary allocation between the companies that these accounts all lend themselves easily to bookkeeping legerdemain to the end of making one company or another bear the burdens of the system.

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We have seen above how by the simple fixation of the price of coke at a low figure the Consolidated added over 7 cents per thousand to its coal gas cost, the benefit being distributed to the other companies. This was not, of course, done without a reason and it is fair to assume that in any case where it can be done without ready detection it will be done.

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The reason is not far to seek. Chapter 125 of the Laws of 1906 fixes the rate for gas at 80 cents

per thousand for all of the interrelated Consoli- 511
dated system in New York, The Bronx, and in Long Island City. Of course, the territories served by the various companies vary greatly, some being densely populated, others more sparsely. The Consolidated itself has the densest and most enviable territory not only here but probably in the world, taking in as it does the 512
very heart of the great City of New York. Mr. Woods, respondents' chief engineer, testified that the consumption of the Consolidated per mile of main was twice as great as that of any other company in the system except the Central Union and 15 per cent higher than that company (pp. 5664–5665). Of course, the items included in 513
distribution expenses are very favorably affected by density of consumption. The distribution expenses are the overheads of an ordinary business and the gas company that can achieve the density of consumption of respondent has achieved that "quantity production" so much sought for in modern business. The repairs to mains, repairs 514
to buildings, the expense of the numerous salaried officials of the commercial department, the cost of meter reading, the general office expenses, especially the officers' salaries, while they may increase somewhat with a great increase of output, certainly do not vary directly with the output. In the assumption that they do, the Court below fell 515
into reversible error (p. 166a).

This being so the Consolidated in these expenses, if standing alone, would have far lower costs than the other companies. Yet it was essential that the Consolidated, being the largest, and the parent company should be in the most advan-

516 tageous position for attacking the rate. It was important not only financially but psychologically that the books should be kept with this in view and that as great a proportion as possible of the expense should be thrown on the respondent.

The means of accomplishing this were ample and practically beyond detection. Except that
517 separate books are kept for the various companies, the entire system is run as one big company, and this includes not alone the gas companies but all of the electric companies in New York, Bronx, Westchester and Queens counties. There is one set of officers headed by Mr. Cortelyou, drawing $40,000 per annum, who control the various operations of the great light-
518 ing monopoly (p. 9880, fol. 29639; pp. 9883-9884, fols. 29648, 29651, 29665; pp. 8419-8423, 8835, 8691, 8712, 8388).

As the president stated on the stand (p. 9880, fol. 29639):

> "The Consolidated Gas Co. is vitally in-
> 519 terested in the welfare of these affiliated companies. In many cases it owns the entire stock of the companies. In many other respects it is concerned with the affairs and the welfare of these companies, and the president of the Consolidated Company is serving his own company best to the extent to which he can give his time to their affairs" (p. 9880).

520

The other officers are no doubt equally alive to the advisability and necessity of running the affairs of the other companies. But when it comes to charging up the salaries of this general office force all is charged to the Consolidated and the affiliated companies go scot free.

Similarly there is an Engineering Department with numerous high salaried engineers that actually builds all of the extensions and improvements at all the various plants of the gas system from Peekskill in Westchester county, to Flushing in Queens county (pp. 700–707, 713–723, 1006, 1007, 1050, 1058, 4721–4724). The salaries of actual draughtsmen and of course the materials and supplies used are charged to the various jobs. But all the brain work and the overhead is paid for by the respondent. 521 522

Also there is a Purchasing Department under one of the vice-presidents which buys practically all materials and supplies of every nature for all the gas companies (pp. 3366, 3369, 3378, 3379, 3428, 3431, 3448, 3449). The goods are billed to the other companies, but at cost, and the Consolidated carries the overhead. Another vice-president, Mr. Addicks, draws a large salary for watching the Standard Oil draw contracts for respondent's signature for the supply of gas oil for all the gas companies (p. 3778). 523 524

There is a Legal Department and a substantial legal expense which of necessity is for the entire system but is borne by the respondent (pp. 6293, 14723–14730).

There is an Accounting Department, a great part of the time of which is spent in recording charges, probably all too low, in favor of the Consolidated and against the subsidiaries. (See Ex. 280, a large volume not printed, and pp. 1460, 1673, 5788, 5789, 6148, 5723.) 525

There is a Transfer Department, for stock transfers, a Chemical Department for experiments and the usual necessary appurtenances of stenographers, messengers and so forth.

The entire expense of the salaries, general
526 office, is $334,777.65 in 1918, and $239,250.78 for the first eight months of 1919, while the general office supplies and expenses are $102,215.71 and $68,271.60 respectively (Ex. 205, p. 16359; Ex. 355, pp. 16610, 16611).

Then the Consolidated has a so-called Street Department, which lays and repairs all mains and
527 services of all the gas companies (p. 5786). The labor involved is allocated on some arbitrary basis (pp. 5455–5462), no doubt to the detriment of the respondent, while materials are charged to the other companies at cost plus 5 per cent (pp. 5785, 5786). No doubt this is too low as outside companies are charged 15 per cent (p.
528 5785).

All of the meters and appliances are repaired by one of the subsidiaries, the Standard Gas Light Company (p. 15574). These are billed to the other companies on a basis undisclosed. The Consolidated's bill for 1918 was $322,539.50, and for the eight months of 1919, $265,116.55 (Ex. 364, p. 16628; Ex. 365, p. 16632). The books of the
529 Standard Gas Light Company were not produced nor was any attempt made to justify the amount. Indeed, when Brundage, chief of the Accounting Department, the only witness called on the books and on these accounts was questioned as to how far the respondent tried to check these accounts, he said,

530 "We are not interested. The Standard agrees to do certain work" (p. 2983).

Immediately thereafter the cross-examination was characteristically hampered by the Master and soon closed (pp. 2983, 2985; fols. 8947, 8953).

The Court has disallowed 10 per cent of the amount claimed, though it plainly states there is nothing in the record to show what the profit was (p. 163a). For aught we know it might be 50 per cent or 100 per cent and since the greater the profit the greater the burden on the Consolidated, it probably was much larger than 10 per cent. 531

Then there is the Promotion Department, so-called, which carries on the propaganda accompanying the system's activities, including this suit, does the advertising for the system, publishes a magazine and so forth (pp. 8361 to 8378, 8388, 8612). Some allocation of these charges was made among the various companies but of necessity the basis is hazy and allows room for further burdens on the respondent. 532 533

There is also a large garage in which are kept 52 passenger automobiles, 20 belonging to respondents and the rest to other system companies (pp. 13123, 13124). Respondent pays the bills and charges something to the other companies, on what basis does not appear. And, of course, aside from the allocation of charges as between the cars of the different companies and those of Consolidated the 20 cars supposed to belong to respondent were not used in respondent's gas business alone. They no doubt were engaged in taking the officers around to the electric and gas plants of the system, they were out on street work for all the companies. Indeed they could hardly move about except in the interest of the system as a whole. Yet these 20 cars and their expenses under the bookkeeping system and the decision of the Court below, are to be charged to the respondent gas business. 534 535

536 Finally there is a tremendous nineteen-story office building used by all the companies in the system, erected in 1914 at a cost of about $3,000,000. This building as the Court says (p. 179a), "contains besides offices proper, many adjunct rooms, such as an auditorium, a restaurant, telephone booths and other conveniences not only for the needs but for the rest and pleas-
537 ure of the tenants." Of the 404,400 square feet of space in the building, the respondent charges itself with 109,194, approximately one-quarter (p. 2813) and a proportion on an arbitrary basis of the auditorium, the restaurant and the jointly used telephone exchange (pp. 2814–2820), bring-
538 ing the Consolidated share up to 38 per cent as the Court finds (p. 179a). The amount claimed to be used by the respondent is far above and beyond its needs as appellants attempted to prove by a real estate expert (pp. 13541–13552) and as the Court has found by deduction from respondent's evidence (pp. 179a, 180a). Respondent with 800 employees uses practically
539 the same amount of space as the New York Edison with 1,600 (pp. 2805, 179a, 180a).

More than that it appeared that when 20,570 square feet became vacant in 1919 it was promptly charged to respondent (p. 2824). The conclusion is irresistible that the respondents' gas business is charged with any space and ex-
540 pense not needed by other companies. This is characteristic of the general method.

But beyond all this it appeared quite clearly from the evidence that of the space supposedly occupied by respondent and charged to its gas business at least 80 per cent was devoted to de-

partments that were working for the system as 541
a whole. (See Appendix, p. 362, below for calculations.) This building, of course, is the center of the tremendous spider web that stretches out through the vast populous territory tributary to the great lighting monopoly. Here are the headquarters of all the departments mentioned above that work the system — the Street Department, 542
the Engineering Department, the Transfer, Accounting, Chemical and Commercial Departments. Here are the offices of the president, of the vice-presidents and of the numerous secretaries and assistant secretaries. Here is the directors' room where the Executive Committee composed of Mr. Rockefeller and his associates 543
meet.

This in brief is the picture of the distribution expenses and of the *modus operandi* of this great company. In many instances, such as the officers' salaries and expenses and the office expense, the entire amount was openly charged to Consolidated gas consumers. In other cases allocations 544
were made but at the trial nothing was presented but the *fait accompli*. The general books of account showed that so much was charged to this company, so much to that. But in the vast majority of instances there was no explanation of the method and in no case was there justification of it by any expert. Mr. Brundage came and said
in substance, My subordinates keep the books and 545
they show certain payments. Mr. Teele an accountant said substantially the same thing in tabular form.

The court below has, as we have partially noted, made some deductions from these expenses (pp.

546 162a-165a). We feel of course that it was far too lenient. Certainly there is no deduction made by him which is not absolutely demanded by any analysis of the proof.

We claimed in the Court below that the entire items of Repairs to Meters, Mains, Services and
547 Appliances, of Promotion Mutual Aid and Automobiles, should be stricken out as absolutely unproven. Of course, we now vigorously contend this, but feel that it will be more logical perhaps to allege this as a failure of proof and a certain ground of reversal rather than to urge the deduction of the entire items. The entire distribution
548 expense is arrived at after such a complication of allocations, unexplained and unexplainable, there has been such an evident and so successful an attempt to load down the respondent's gas consumers for the benefit of the other parts of the system, that we feel certain this Court as it did in the *Minnesota Rate Cases*, 230 U. S. 352, 461, will find the proof faulty and send the case back.
549 Particularly do we feel that this should be done here as there was not in this case as there was in the Minnesota Rate Cases, a bona fide attempt by expert testimony to justify the numerous allocations.

There are, however, under the improbable supposition that these expenses will be considered
550 as proved at all, certain corrections that should be made to the finding of the court below.

(a) GENERAL OFFICERS' SALARIES AND GENERAL OFFICE SUPPLIES AND EXPENSES.

We can see no justification in the court's confining its deduction to certain departments and

not extending it to the whole of these items (163a). We vigorously contest its statement — 551

> "In the Engineering, Commercial, Purchasing Departments there can be no ground for allocation at all" (163a).

We submit on the testimony above cited that all of these departments work for the entire system. We believe a review of the evidence will support our contention. This will result in a further saving of $40,000 in 1918 and $30,000 in 1919. 552

(b) CHARGES TO UNITED STATES FOR OFFICERS' SERVICES. 553

The United States Government during the year 1918 used the 21st Street and 99th Street plants of respondent for toluol extraction. The Government was to pay respondent $150 per day for the services of the officers and employees regularly in the pay of respondent, instead of perfecting a special organization for this particular work. 554

It seems to be conceded, at least not disputed, that this revenue should when paid be included in the company's revenues for that year. It had not been paid at the time of the trial, but the vouchers had been passed by the Government.

The total for this charge to the Government is $36,728.50 (complainant's Ex. 344, p. 16575) and is fully explained by witness Addicks (pp. 4367–4370). 555

The following colloquy regarding it took place (pp. 4367-4370),

> "Q. Mr. Addicks, take this Exhibit 344, in which you have an item here for administra-

556 tive expenses. Take the administrative expense, what is that made up of, whose services?

A. It is made up — the item is made up of the services of the employees, general officers of the company —

Q. Like yourself? A. Like myself.

Q. And Mr. Cortelyou?

The Master: Let the witness answer.

557 Q. Well, what officers, what high-priced officers contributed to that sum?

A. Who had to do with the work in connection with the toluol, in whatever department, that might have been employed.

Q. Now, I want to know first the high-priced officers that contributed to that sum

558 of $36,728.59.

Mr. Ransom: The company has no high-priced officers.

The Master: Well, the higher salaried officers.

Q. Higher salaried officers? A. This item was based on an amount — an aggregate amount per day."

559 Judge Hand of the court below misunderstood our contention for he states:

> "Charges to United States for Officers' Services.
>
> This item does not appear on Exhibits 364 and 365, from which I calculate the cost of distribution. I need not consider it"

560 (p. 164a).

Of course, this amount does not appear as a cost of production or distribution and should not so appear. But it should have been included as a Miscellaneous Revenue of the respondent. It was not and of this appellants complain and

justly so. We believe the court below would have made this allowance, if it had been able to give to the case more time. 561

(c) LEGAL EXPENSE 1919.

The item for law expense of $40,000 for the first 8 months of 1919 (Ex. 365, p. 16632) is evidently an estimate. The amount paid for the whole year of 1918 was only $42,551.18 (Ex. 364, p. 16628). 562

The following vouchers were put in evidence by appellants (pp. 13959–13975), and are all those actually charged to "General Suspense-Law Expense" during 1919:

VOUCHERS RELATING TO PERIOD PRIOR TO 1919 BUT WAS FILED IN 1919 563

Date	Voucher No.	Exhibit No.	In favor of	Remarks on vouchers	Amount
Jan. 2	18	AA-468	Sherman & Sterling	Six months' service	$12,500 00
Feb. 1	1677	AA-469	Beardsley, Hemmens & Taylor	For services in full	7,500 00
May 3	6125	AA-471	Sherman & Sterling	Balance to Dec. 31, 1918	10,000 00
					$30,000 00

APPLICABLE TO RATE CASE EXPENSE

Date	Voucher No.	Exhibit No.	In favor of	Remarks on vouchers	Amount
July 22	10350	AA-513	Whitman, Ottinger & Ransom	Retainer on account of services	$10,000 00
July 22	814	AA-474	Whitman, Ottinger & Ransom	Retainer on account of services, bill for $7,500, $5,000 charged to other companies	2,500 00
Sept. 19	13317	AA-475	Whitman, Ottinger & Ransom	Retainer on account of services	5,000 00
Dec. 31	503	AA-476	E. Henry Lacombe	Account services	1,000 00
					$18,500 00

564

REGULAR LEGAL RETAINER

Date	Voucher No.	Exhibit No.	In favor of	Remarks on vouchers	Amount
June 7	9248	AA-472	Sherman & Sterling	Professional services to June 30, 1919	$12,500 00

UNEXPLAINED LEGAL SERVICES 565

Date	Voucher No.	Exhibit No.	In favor of	Remarks on vouchers	Amount
April 3	4763	AA-470	Edward N. Shieberling	For services rendered	$250 00
July 10	9824	AA-473	Edward N. Shieberling	Balance for services rendered	750 00
Dec. 31	7897	AA-477	Martin S. Decker	Public Service Law revision, 15 days, $750 Expenses to and in New York, 165	915 00
					$1,915 00

566 It is plain, therefore, that the ordinary legal expense during 1919 was the same as in 1918. Sherman & Sterling were getting their regular retainer of $25,000 per year. To the one voucher of $12,500 must be added an additional amount of $4,133.33 for the months of July and August. Allowing something for disbursements, a prob-
567 able payment of $17,500 would seem reasonable for this period. Reducing this by one-third to fix the amount applicable to the gas business gives a proper sum chargeable of not more than $11,666.67. This gives an additional saving of about $15,000 over the deduction by the Court below (p. 164a).

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(d) MISCELLANEOUS GENERAL EXPENSES.

Under this account, though the items are small comparatively, we cannot refrain from going into them to some extent as they indicate the same method followed in small matters as in large, namely the loading up of Consolidated gas con-
569 sumers for the benefit of the other branches of the business. The entire item amounts to $62,944.94 in 1918 (Ex. 364, p. 16629) and $88,714.08 in 1919 (Ex. 365, p. 16632) of which the Court below deducted $10,000 in 1918 and $46,000 in 1919, most of the latter sum being a portion of the expenses of this present suit and all of the rest, both in 1918 and 1919 being for items of
570 Defensive Emergency Service (p. 166a).

In appendix B, we print certain of the details of this account. We contend that all of the expenses of this rate litigation should be eliminated. If the Court is correct that every gas company — and we suppose all other utilities

as well — can count on going into the Courts once 571
in ten years (see p. 166a) there will be little time
for other business in this Court. As a matter of
logic any allowance for rate case expense savors
too much of allowing the company to pull itself
up by its own bootstraps, and especially in con-
fiscatory cases such as this it has been repeatedly
disallowed. 572

We do not understand that any court has ever allowed any such expense.

In the Kings County Lighting Co. v. Lewis case, reported in 110 Misc., 204, Mr. Justice Greenbaum said in the course of his opinion, referring to legal expenses in prosecuting the action: 573

> "Included in these operating expenses, however, are legal expenses, amounting to $16,653.24 incurred in prosecuting this action. * * * It is conceded by the plaintiff that these two items (one being the said amount above for legal expenses) are properly deductible from the operating expense." 574

In the case of Brooklyn Borough Gas Co. v. Woodbury, 17 State Dept. Reports, 81, Referee Hughes did not pass upon the question, for there it was conceded by Mr. Ransom, who was then counsel for the Public Service Commission, that the allowance for legal expenses should be spread over a number of years (p. 132, his brief in that 575
case). This is the same Mr. Ransom who appeared for the respondent on the trial. He did not make the claim there for the commission that allowance for prosecuting the suit should be eliminated entirely. Therefore, in that case the only question

576 for the referee to consider was whether he would spread it over a number of years; not whether he would disallow it entirely.

This will make a difference of $4,632 each year (p. 166a).

As to the other expenses, too numerous to detail here at length, many were, we earnestly con-
577 tend, entirely improper on their face, none were properly proven and all or nearly all were really for the benefit of the system rather than of respondent's gas business. We contend that if they are to stand as proven at all, at least one-third, on the same basis as the officers' salaries, should be deducted. This will make a difference
578 over and above the difference in rate expense above noted in 1918 of $16,824 and in 1919 $12,836.

(e) SUPERANNUATION.

As to this matter we claim that reversible error was committed in the refusal of the Master to allow cross-examination. The court below con-
579 cedes this was error but brushes it aside on the theory that the appellants would not have proved anything any way (p. 165a). Of course, now our mouths are closed. The critical moment is passed. What would have been discovered on cross-examination can only be known on a new trial.

580 The Master's attitude on this is so characteristic that we cannot refrain from quoting the record.

> "Q. Mr. Carter, is there a particular record kept that shows the details, the length of service, the details of superannuation account — is there some book that has that es-

pecially? A. The minutes of the Executive Committee record in full, the reason for putting a man, the length of his service, the amount, and indicates that he is on at the pleasure of the board. 581

"Q. Is there any book or record that will show the details? A. Nothing but that.

"Q. There is no place then that we might refer to find out whether or not in our humble opinion there has been carelessness or extravagance — 582

"The Master: Mr. O'Brien, you need not press that question any further, because I shall give you a square cut ruling on the record, that I shall not accept any proof by you or the opinion of anybody living or dead that the judgment of these officers of this company was not properly exercised in putting a man on superannuation. That is stretching the rubber entirely too thin, and I won't permit it to be done. Take your exception to my ruling. That disposes of superannuation. 583

"Mr. O'Brien: That practically means —

"The Master: That I am not going to let you review the action of the officers in putting a man on superannuation. 584

"Mr. O'Brien: Either as to the recipient or to the amount given, or the term during which it is given?

"The Master: No, it is a pure matter of internal policy that I will not permit evidence to affect. 585

"Mr. O'Brien: It is internal policy, it is a sanctum sanctorum in the company?

"The Master: Yes.

"Mr. O'Brien: To which the eyes or the hands of counsel for the defendants may not protrude?

586 "The Master: Precisely, any more than you already have. If there is something that these officers cannot be trusted for, let us get it.

"Mr. Clark: Does it have a be. ing on it that they possibly have not collected the money with which to pay this superannuation during the time a man was on the pay
587 roll? Why should the consumers pay a superannuation item which is based on past service?

"The Master: Because I think it is proper. You have my ruling, I have ruled squarely that the consumers of the Gas Company in the year 1920 must pay as a proper expense of running this business
588 the amounts paid monthly to superannuated employees.

"Mr. Clark: Regardless of whether any amount was collected in the past for that purpose?

"The Master: Yes.

"Mr. O'Brien: You have ruled now, it is a sweeping rule you have made, that we
589 have no right to criticise it no matter what the amount is —

"The Master: Right.

"Mr. O'Brien: No matter what the conditions are under which the resolution, if there was such a resolution, was passed by the Executive Committee?

"The Master: Yes.

"Mr. O'Brien: And everything goes in
590 effect with your ruling?

"The Master: Yes.

"Mr. O'Brien: That covers it.

"The Master: I am not going to balance the question of judgment in that regard, and I won't take evidence on it.

"Mr. Chambers: Exception.

"Mr. O'Brien: That is quite clean-cut, and it shows where you stand and where we stand and I take an exception to it" (pp. 12922-12925). 591

Aside from this, however, we earnestly contend that, however laudable superannuation payments may be, they are in essence gratuities paid in recognition of past faithful service. Like all 592
pensions, they should be paid out of a fund collected while the services were being rendered and not put entirely upon the present gas consumers, to whom the pensioned employees render no service. Here there was no such fund collected (pp. 8721, 8722).

We earnestly contend that the ruling of the 593
Justice Greenbaum in Kings County Lighting Co. v. Lewis, 110 Misc. 204, 230 is logical and correct. He said—

"It is commendable to recognize the faithful services of an old employee. Had it been shown that the plaintiff had adopted a policy years before to encourage faithful and efficient service by providing a pension fund for old age or other disability from which employees would be paid, the moneys set apart for that purpose could have been spread over many previous years and not charged against the years when disability existed." 594

595

Particularly is this so in this case where the superannuation payments have increased from $12,361 in 1909 to $65,704.22 in 1918 or over 400 per cent in nine years (Ex. AA-129, p. 18087).

The deduction for this in 1918 is $65,704.22 (Ex. 364, p. 16628) and in 1919 is $47,361.03 (Ex. 365, p. 16632).

596 **(f) AUTOMOBILE EXPENSE.**

In this matter certainly there should be a deduction of one-third on the same basis as the officers' salaries. No such large fleet of motor vehicles would be required by respondent's gas business alone.

This deduction would be $48,703.92 in 1918 and
597 $31,835.70 in 1919 (Ex. 364, p. 16628, Ex. 365, p. 16632).

The sum of these deductions is as follows:

	1918	1919
a — General Officers' Salaries	$40,000	$30,000
b — Charges to U. S. Government	36,728	.....
c — Legal Expense	.....	15,000
d — Miscellaneous General Expense	21,456	17,468
e — Superannuation	65,704	47,361
598 f — Automobile Expense	48,704	31,835
	$212,592	$141,664

This will make the costs of distribution $3,626,745 for 1918 and $2,228,645 for the first eight months of 1919 instead of the figures found by
599 the court (p. 166a). On the basis of actual sales this gives a saving in 1918 of $.0117 and in 1919 of $.0115 per M cubic feet.

We believe, however, that it was particularly unfair for the court below to take these expenses on the basis of actual sales rather than on the basis of the probable sales. Certainly the court
600 is in error in its assumption that "the greater part of them will vary generally with the amount of business done" (p. 166a). This is contrary to all reason. Some of them may increase a little as the sales increase a great deal but others like officers' salaries and expenses, repairs to

mains and miscellaneous expenses will not 601
increase at all.

But in 1919 it should be noted that the method adopted by the court below leads to what we contend is a very unjust result to the consumers. The expenses under distribution are made up partly of monthly salaries and partly of repair items. Naturally the repairs to the distribution system 602
are done in the open season of spring and summer while, of course, salaries go on monthly whether sales are high or low. Summer is the vacation period and while work for the salaried employees is slack the expenses run on and the payroll of daily repair men goes up.

We have seen that the first and last thirds of 603
the year are periods of comparatively high production and of low cost particularly in distribution while the summer months from May to August inclusive are the slack months. To take the first two-thirds of the year as a criterion is therefore particularly unjust in these items and shows the impropriety of the bases of the court 604
below.

On the basis taken by the court in other matters of sales of 20,000,000,000 cubic feet per year (p. 182a) the cost per M sold in 1918 would be $.1518. For the year 1919 the total distribution expenses may be arrived at by dividing by 2/3 as 8 months were taken as a basis. This gives dis- 605
tribution expenses of $3,342,966 for the year which on a basis of sales of twenty billion feet gives a cost per M of $.1671. These show a saving over the court's figures of $.1802 for 1918 and $.1934 in 1919 (p. 166a) of $.0284 and $.0263 respectively.

606 (g) **RENT ON PORTIONS OF THE GENERAL OFFICE BUILDING.**

We have pointed out above the general character of the use of the General Office Building and give in Appendix A the particular facts.

The court states as to this:

> "The question enters into the rate base.
607 Dr. Weber did, it is true, figure the total rentals of the property and charge them against the plaintiff, but that would not be gas income any way" (p. 179a).

The court seems to have misconceived the basis on which this building, its rents, and expenses, were treated by both sides.

608 The respondent's method, partially adopted by the court below is set out in Schedule 7, Ex. 205 (p. 16342) and was explained by Mr. Teele (pp. 2746-2748). Respondent credits itself, as this shows with all of the expenses of the office building and charges itself with all of the rentals from tenants except an amount equalling 6 per cent
609 on the value proportionately to the cost of the building of space occupied, thus as Teele says taking the value of that portion "out of the rate base." (p. 2747.)

The only change Dr. Weber made was to charge the whole of the rentals to respondent and leave in the rate base the entire office property.

610 The court seems to have overlooked this viewpoint of both the parties that the rentals received should be charged to respondent if it is to be credited with the entire operating expenses of the building. These expenses, though they do not appear separately in Exhibit 205 were shown by

appellants to be $192,187.33 in 1918 (Ex. AA-403 p. 18703). 611

The court seems to have overlooked these figures though it admits there should be a credit (p. 179a). On respondent's basis of 38% it should stand $73,131.19 of this expense while on the basis of the court below of 28% (p. 180a) it should only stand $53,812.41; a difference of $19,318.78.

However, we think the court was in error in its 612
conclusion. It finds that on the basis of space occupied by the Edison Company the respondent should have used only 70,000 feet instead of 113,785 feet (pp 179a–180a). But, as we point out in detail in Appendix A, printed at end of brief, the Consolidated employees using this space are not working solely or mainly 613
in the interests of respondent's gas consumers. Certainly at least 1/3 of this space should be charged to the other companies on the same basis as officers' salaries and the reasonable rent thereof credited to respondent's distribution expenses. It appears that the other companies were paying at the rate of about $1.50 per square 614
foot for the space occupied by them. (Ex. AA-402, p. 18702). Certainly this is a low rate for office space in New York City. One-third of 70,000 feet at this rate would amount to $35,000.

Moreover, we cannot agree with the court below that "extra space was prudently built in 1914" (p. 180a) and that therefore respondent should 615
have no advantage from unused space either by way of reducing the expenses of operating the building or from the rents derivable from the unused portion. The court can surely take judicial notice of the demand for office space in

616 New York city. Why, in face of such a demand should this up to date building be half occupied to the expense of the gas consumers of respondent?

Either this space should be considered as rented and the probable revenue at $1.50 a foot credited to respondent's distribution expenses or else tha
617 proportion should be deducted from the expense of the building. The first method is preferable as then no adjustment need be made as to the rate base. This will make an additional saving of $65,757.50.

The total deductions that should be made then on account of the office building are:

618

Cost of maintenance omitted by court below	$9,318.78
Rental value of space found necessarily occupied	35,000.00
Rental value of space unoccupied	65,757.50
Total	$110,076.28

619

(h) MAINTENANCE OF ASTORIA TUNNEL.

Though the amounts involved are not large yet there is no better example in this case of the extent to which respondent here has gone in absorbing expenses of the entire system than in the expense of the jointly used conduits from
620 the Long Island plants to Manhattan.

The court below gives its version of the situation as follows:

> "There are two tunnels running between Long Island and New York, one called the 'Astoria Tunnel,' from the Astoria plant to

the Bronx, which cost $5,178,614.58; the other 621
further south and from the New Amsterdam Company's plant to Manhattan, and called the 'Ravenswood Tunnel.' These are each used to conduct gas from the Astoria plant to the plaintiff's mains, the plaintiff being the sole consumer of Astoria gas. The lower or Ravenswood tunnel is used to convey coal gas which has been enriched by oil at Ravens- 622
wood; it is small and cost seven hundred thousand dollars. However, to reach it the gas must pass through mains on Long Island valued at $844,422.71. All these conduits are formally owned by the East River Gas Company and are used by others than the Astoria Company. The several corporations have adopted a figure or fifty-seven plus per cent. as representing the plaintiff's proper 623
share of these conduits based upon their relative requirements. They have also adopted somewhat arbitrarily the figure of three and a half per cent. as proper for the renewals and repairs necessary for upkeep, the figure being taken from calculations made by the company's engineers by an average over a number of years. *There was no apparent* 624
motive in fixing it at that amount, except a desire for an honest apportionment of charges between them, even though it were for bookkeeping purposes. Had the defendants wished to meet this proof the actual vouchers were available for them to do so. The estimate under the circumstances seems enough to make a prima facie case, but 625
against any possibility of error I will take it at only two per cent.

However, it appears to me a closer estimate not to take the full valuation of the Astoria Tunnel and leave out the Ravenswood and the connecting lines. It is better

626 to treat the whole system of conduits between Astoria and New York as one and to take a percentage of the whole. Past experience indicates fifty-seven per cent. plus, but I shall give my reasons in considering the 'rate base' for taking it higher and allowing Four million four hundred thousand dollars as the proper allocation. At two per
627 cent. the repairs figure Eighty-eight thousand dollars which, on a spread of twenty billions, which it is proper to take on this item, is $.0044. With the other distribution cost the total is $.1846 for 1918 and $.1978 for 1919" (p. 167a).

As a matter of fact the "cost" of these prop-
628 erties was entirely unproven as were the expenditures for maintenance. Appellants, therefore, felt no call to prove either item. The burden was not upon them though the court below seems to indicate erroneously that it was. However, the actual cost of maintenance was in the record as will be shortly pointed out.

629 Perhaps there is no better index to the attitude of the court below than this throwing of the burden upon appellants and his assumption that

> "There was no apparent motive in fixing it (the maintenance charges) at that amount (3½%) except a desire for an honest apportionment of charges between them (the various companies)" (p. 167a).

630

As we have seen and shall see again in this instance, there was always a very apparent practice and motive to put all possible expenditures on respondent's gas consumers.

As the facts concerning all these conduits are

the same, and the Astoria Tunnel accounts for over 5/6 of the total expense, it will be simplest to consider that tunnel alone. 631

Mr. Brundage testified as follows:

"Q. Mr. Brundage, you were interrogated with respect to certain tunnel men employed in connection with the maintenance of the Astoria tunnel? A. I was. 632

Q. Will you state just what is the fact regarding the way their wage charges are handled? A. There are a few pump men in connection with operating the Astoria tunnel that as a matter of convenience are carried on the Astoria pay roll, as they report to the Astoria superintendent, and at the end of each month all expenses so paid are 633 charged to the East River Gas Company of Long Island City.

Q. That is, a bill is rendered by the Astoria to the East River Company for these pump men? A. Monthly.

Q. And those bills are paid? A. Yes.

Q. And the account is then closed? A. Yes, sir. 634

Q. This account is carried in the Astoria books as maintenance of Astoria tunnel? A. It is. * * *

Q. The control of the tunnel is entirely under the employees of the Astoria Company, Mr. Sperling, Mr. Woods and Mr. Lawrence? A. Yes" (p. 6152).

635

That is the Astoria Company really maintains the tunnel, which, being far below the river and well protected, requires very little expenditure. The account "Maintenance of Astoria Tunnel" in the ledger of that company, shows a payment for renewals and repairs in 1919 of only $11,000.

636 But this is not charged direct as would be reasonable. It is billed to the East River Company which counters with a bill as follows:

> "For use of the following facilities during the month of December, 1919, as per agreement between the respective companies.

637

ASTORIA TUNNEL

	Total	Used by Other Companies (42.55%)	Used by Your Company 57.45%
Investment	$5,178,614.58	$2,203,500.50	$2,975,114.08
Interest on Investment at 6%	$310,716.88	$132,210.03	$178,506.85
Taxes	123,022.59	52,346.11	70,676.48
Renewals and repairs	187,684.28	79,863.92	107,830.36
638 Total for year 1919, at 12%	$621,433.75	$264,420.06	$357,013.69
Less amount billed to your company during 11 months to 11-30-19			$327,262.54
Balance			$29,751.15"

(Voucher No. 6567, Astoria Company, put in evidence p. 13064. Ex. AA-463.)

639 As appears from this exhibit the Astoria Company pays the East River $107,000 for 60% of maintenance charges that originally cost only $11,000.

The master, hurriedly passing over the facts as in all instances allowed the Astoria "not less than one cent (1c) per 1000 cubic feet of gas sold
640 for these expenses." (57th finding, page 37a.) This is an allowance of $200,000 instead of 60% of $11,000 or $6,600.

The court has allowed .44 cents or $88,000 which includes to be sure besides 60 per cent. of the Astoria maintenance charges, also 60 per cent. of the charges on the other conduits figured

at 2 per cent. on supposed cost of $1,500,000. This 641
is $18,000 which, of course, is grossly exaggerated in the same manner as the Astoria charges. For the Astoria maintenance alone then the court allows $70,000 when the actual expenditures were only $11,000 and the Astoria proportion only $6,600 on the court's allocation which is no doubt burdensome to the Astoria and respondent. 642

This difference is $63,400. It seems fair, however, in view of the excessive allowance for the other tunnels that the difference between the Court's figure of $88,000 and the total maintenance cost of the Astoria tunnel itself should be deducted. This amounts to $76,705.

Summary of Additions to Net Income Claimed by Appellants. 643

For the convenience of the court we will state here in summary form the contentions of the appellants as to additions to net income which we believe were erroneously omitted by the court below: 644

	1918		1919	
	Amount	Cents per M sold	Amount	Cents per M sold
Net return not reduced by income tax as above (p. 182a)	$3,625,000	$0.1813	$2,338,000	$0.1169
Saving on cost of production by reasonably efficient methods and with prudent and economical purchases of oil	2,178,000	.1089	2,492,000	.1246
Distribution expenses (pp. below)	568,000	.0284	526,000	.0263
Rent of office building	110,076	.0055	110,076	.0055
Maintenance of Astoria tunnel	76,705	.0038	78,611	.0039
Total	$6,558,781	$0.3279	$5,544,687	$0.2772
Deducting uncollectible bill the figures will be	95,330	.0048	47,535	.0024
Total	$6,654,111	$0.3327	$5,592,222	$0.2796

645

The value of the property upon which respondent is entitled to a return is discussed in a later point (see Point XII). It will be noted that we claim that respondent is entitled to a return upon $27,178,375.00. This does not include the value of the Astoria property and we believe that prop-

646 erty should be excluded from the rate base on the principles laid down in Consolidated Gas Company v. City of New York, supra (p. 860) and on the further ground that the fair value of the Astoria property was not proven.

The court below included in the rate base the Astoria property, owned not by respondent, but
647 by a separate corporation known as the Astoria Light, Heat & Power Company, in the sum of $15,497,615 (pp. 180a–181a). It is true that respondent owns the stock of this company, but this is likewise true of many of the other companies selling gas to it, like the Standard Gas Light Company and the New Amsterdam Gas Light Com-
648 pany. If it is sound to include the Astoria Light, Heat & Power Co., plant in the rate base, then all the rest of these plants should be included. We maintain, however, that the Astoria Light, Heat & Power plant should be entirely excluded.

In the first place, respondent did not claim it as a part of the property upon which it was
649 entitled to a return either in its bill of complaint or upon the trial; and in the second place, there was no proof upon the trial of the fair value of the property of said Astoria company used and useful in making and distributing gas. In the third place, if it were to be taken at all, depreciation should be deducted from the cost. The learned court below took the socalled cost of the
650 whole plant without allowing anything for depreciation, probably because there was no proof in the case of depreciation. The reason why there was no such proof was because respondent had not proved the fair value of this property and consequently, appellants offered none having no proof to meet.

Enough already appears to show that the

Astoria property is made up of a vast area of unused real estate (340 acres, 60 or 70 occupied, pp. 4963–4964) and some portions of plant is to take care of future developments. These should not, of course, be included and because of these defects in proof we contend that there is no alternative but to exclude the entire property. 651

Nor would the court be justified in taking 6% on the investment in this plant, for two reasons: First, there is no proof of what part of it is used and useful in making and distributing gas; and second, whatever portion of it is used and useful has not been depreciated. 552

It further appears that the figure used by the court below for the investment in the Astoria plant was not correct for the reason that it did not cost the amount entered by the company on its books. In other words, the entire tract of land at Astoria cost $450,000, but the Astoria company entered it in the books at $750,000. As Mr. Frank testified: 653

> "Q. How much did the company pay for that land there? A. $450,000. 654
>
> Q. And then the Astoria company took it on at about $800,000? A. $750,000 paying part in cash and paying partly in bonds at 80% * * *
>
> Q. So that the land on which that plant is built over in Astoria was bought for $450,000 by the Consolidated company? A. Yes" (p. 12878). 655

However, for the purposes of comparison we have given, in the table below figures with the Astoria plant included in the rate base, at the amount taken by the court.

For the convenience of the court, we state below in summary form the findings of the court with

656 which respondent having assigned no error must be assumed to agree, and the contentions of appellants, both as to the earnings of respondent and the fair value of its property used and useful in making and distributing gas for the years 1918 and 1919.

		1918	1919
657	Earnings as found by Court, excluding Fed. Income Tax, p. 182a....	$3,626,000	$2,338,000
	Earnings, as claimed by appellants..	6,654,111	5,592,222
	Rate base, as found by Court excluding franchises	64,196,533	64,196,533
	Rate base, as found by Court, including franchises	71,977,533	71,977,533
	Rate base as contended for by appellants	27,178,375	27,178,375
658	Rate base as contended for by appellants and adding the Astoria property	42,421,009	42,675,990
	Rate of return based on Court's earnings and Court's rate base, excluding franchise	5.65%	3.64%
	Rate of return based on earnings as claimed by appellants and Court's rate base, excluding franchise....	10.36%	8.73%
659	Rate of return on Court's earnings, with Court's rate base, including franchise	5.04%	3.25%
	Rate of return based on earnings as claimed by appellants, and Court's rate base, including franchise.....	9.24%	7.77%
	Rate of return on Court's earnings, using rate base as contended for by appellants	13.34%	8.60%
	Rate of return on earnings as claimed by appellants, using rate base as contended for by appellants	24.48%	20.61%
660	Rate of return on earnings as claimed by appellants, using rate base as contended for by appellants and adding thereto the figure used by the Court for the Astoria property	15.68%	13.10%
	Rate of return on earnings as found by Court, using rate base as contended for by appellants and adding thereto the figure used by the Court for the Astoria property...	8.55%	5.47%

POINT IV

661

The period selected by respondent in its bill of complaint, viz.: from the time the statute took effect in 1906, to 1918, inclusive, should be adopted in this case, and the statute in question should not be considered confiscatory merely upon the financial results obtained in one abnormal year (1918) and a part of another, (10 months of 1919).

662

The Master gave little consideration to the period. As a basis for his decision he has taken into consideration only the year of 1918 and the first ten months of 1919.

The Master based some findings on the month of October, 1919. (See Findings 23, 24, 27, 34, 39, *et seq*, pp. 31a-33a). His finding that the statute was confiscatory, however, seems to be based upon the first eight months of 1919, for he says:

663

> "Having in mind that the complainant must prove its case beyond any reasonable doubt I reach the conclusion that the safest basis upon which to work was the actual result of operations in the Astoria plant *for the eight months ending August 31, 1919*" (Opinion of Master, p. 52a).

664

The District Court, in considering the period for a test, refused to take an average over the whole period both far cost and production and capital valuation (p. 140) as appellants contended. The court below said:

665

> "Either the evidence of the last three years is sufficient basis for a forecast, or it is not. If not, ante-bellum values should be used merely for lack of any better; if so, the average of the last three years is the proper basis.

666 It is quite true that if these prices could fairly be regarded as such temporary aberrations as the rate was meant to cover, this would not be so. * * *

Several reasons lead me to believe that present price-levels are not merely transitory though I recognize the danger of any prophecy " (p. 141a).

667 The learned Judge thereupon concluded to take the year 1918 and the first eight months of 1919, used by the Master, and to that add eleven months more, or from January 1, 1918, to August 1, 1920 (p. 143a), although no evidence whatever was taken during the trial concerning the additional 668 eleven months, and the learned Judge says that he is entitled to consider it because " evidence is not necessary in the face of so patent and obtrusive a fact of daily life " (p. 143a), and does not consider the question of period further than to say:

> " The period, despite its unusual character, I find to be a significant basis for the 669 calculation of the cost of production and the ' rate base ' for a future time long enough to call for some judicial action " (p. 143a).

Thus, he leaves it in doubt whether he means to sustain the period taken by the Master of one year and eight months, or whether he means to 670 add to one year and eight months eleven months more, making two years and seven months. But we submit it was error to decide the case upon either of these periods as we shall presently show.

The period to be considered, the appellants assert, is of great importance in this case.

Respondent, in its bill, based its contention that 671
the statute was confiscatory upon the period from the time the statute was enacted down to the time the complaint was verified, viz., 1919. The bill of complaint alleges:

> "* * * and there now exists an aggregate deficiency in your orator's earnings below six per cent., since the date the said 672
> eighty cent rate was made effective, in the amount of at least $12,000,000" (see XII of bill of complaint, p. 4a).

And, further:

> "* * * and, at no time since the said rate went into effect, has it permitted your orator to earn a fair return thereon" (see 673
> XVI of bill of complaint, p. 6a).

This was the period selected by respondent when it drew its bill of complaint. During the course of the trial the bill of complaint was not modified or amended in this particular. In this connection it is proper to call the Court's atten- 674
tion to the fact that the Master repeatedly found fault with this issue as raised by the complaint. The Master said:

> "I should never have drawn the complaint in the form that it has been drawn, in the light of the information I have gotten in this case; and perhaps counsel would not 675
> have drawn the complaint in the way they have drawn it in the light of the developments in this case" (p. 11114, fol. 33340).

And, again:

> "I have sustained it for the reasons I have given, because in my opinion it is not material or relevant to this case what the

676 condition of these plants was, or as to whether they were used or useful, from the period May 1st, 1906, to December 31st, 1917" (pp. 11112-3, fols. 33336-7).

And, again:

"I will not take any proof as to the condition of the plants from 1906 to 1917, or as
677 to whether any particular piece of property was used or useful during that period" (p. 11110, fol. 33328).

That respondent selected the period the time the statute had been in effect as the proper one, was reiterated during the closing argument before the District Court. There Mr. Garver said:

678

"I suppose we could have returned to this court after a year's experience, if we had been minded to, because we have not had a return of 6% of the reasonable value of our investments since the decision of the former case (p. 29, record of argument before District Court, not printed).

679 We contend that the question of the period to be considered has been definitely settled by the decision of this court in *Knoxville* v. *Water Co.*, 212 U. S. 1, and the cases cited farther on in this brief, and that the court below erred in not following the rule there laid down.

The rule set forth there was that confiscation
680 would not be based upon a year especially so if the year was abnormal.

The opinion for the court in that case was written by Mr. Justice Moody. He said: (p. 14.)

"But the decision in the court below was based solely on the operations of the fiscal year ending March 31, 1901. And the amount of net income ascertained, namely,

> $36,000 was obtained by applying the reductions made by the ordinance to the operations of that fiscal year. We think it was error to confine the investigation to, and base the judgment on, *that year alone*. The precise subject of inquiry was what would be the effect of the ordinance in the future. The operations of the preceding fiscal year, or of any other past fiscal year were valueless if the year was abnormal and were only of significance so far as they foretold the future."

There this court said in a clear statement that the operations of a preceding fiscal year or past fiscal year were valueless if the year was abnormal, and only significant so far as they foretold the future.

This rule we submit should have been applied in this case but it was not. No good reason has been assigned and we think none could be to show that the above rule was not a sound one, and the instant case clearly demonstrates the rule there laid down should not be disturbed.

The learned Judge below says that " so far as I found in the books a test of two years is enough." (P. 143a.) He apparently overlooked the question of the abnormality of these years. In the *Minnesota Rate Cases* (230 U. S., 352) cited by him there was no question of the abnormality of the period; and in the case of *Rowland* v. *St. Louis, etc.* (244 U. S., 106) he said the rate was upset upon a showing of only two months, yet this court said in regard to the period in that case:

> " We agree with the District Judge that the two months of investigation afforded a

686 basis for argument as to constant conditions."

The two months considered in that case were the months of November and December, 1913, in which perfectly normal conditions prevailed.

The Master said during the course of this trial:

687 "I am not going in this case to decide that they should have discontinued some plant seven years ago, or that fourteen feet of land ought not to have been used at some time. I won't do it. I do not think it is necessary for this case; because I think, after all, there *won't be and cannot be evidence which would justify a finding that they did not get a fair return down to December 31st, 1917*" 688 (p. 11117, fol. 33350).

The record is full of statements made by the Master in which he said from time to time that he would not consider the return made by respondent in previous years.

689 The appellants contend that the inquiry in this case should cover the very period selected by respondent in its bill of complaint — namely, the whole period of time elapsing from the time chapter 125 of the Laws of 1906 was enacted to the date of the commencement of this action, and the statute should not be declared confiscatory merely by considering the cost of manufacturing gas dur-690 ing one, two or three abnormal years.

From and after January 1, 1909, respondent charged its consumers at the rate of 80 cents as specified in the statute, although at that time three years, 1906-1909, had elapsed, and the extra amount over and above the statutory rate had been impounded so that at the time of the decision

of this court (January 12, 1909) the result of the 691
rate restriction in the statute was easily ascertainable. Three years might have seemed too short a period to test the effect of the statute by actual operation under it; or perhaps the blighting effect of the restriction so strongly anticipated failed to materialize. At any rate, no
action to test the constitutionality of the statute 692
was immediately begun.

The years 1910 to 1916, inclusive, were allowed to pass unnoticed by respondent, because the 80 cent gas rate gave to it a just and fair return and something in addition.

During these many years an excellent oppor-
tunity was presented to the respondent to test 693
the validity of the statute deemed so obnoxious by showing the damaging effect of its operation. The results had been known for each year from 1906 to 1916, a period of eleven years. These years as to price of labor, materials and supplies and weather were fairly normal years and a fair
test of the operation of the statute could have 694
been obtained. But this monopolist slept, evidently satisfied with its return and the restriction.

Beginning with about the year 1917, due to the World War, prices began to increase slightly and conditions foretold that we were likely to enter
into abnormal times. 695

The year of 1918 will go down in history as a time of unrest. It was an abnormal year.

It was not until the beginning of the year 1919 that respondent filed its bill of complaint. This year, too, was abnormal. The appellants contend that respondent deliberately selected this period

696 of abnormal, unusual, unnatural and unprecedented conditions to strike down the statute in question, and that it is taking advantage of a world-wide calamity to raise its rates.

Aside from that, the Master's findings were based upon the incomplete period from January 1, 1919, to August 31, 1919. This period plainly
697 cannot be considered a criterion of the cost of gas, comprising as it does practically all of the summer months when the output of gas is small and the cost consequently high, and but two of the winter months in an extremely mild winter, and excluding the last four months of 1919 when production was high and cost consequently low.
698 Moreover, the entire bookkeeping system of the Consolidated Gas Company is built up on a yearly basis. It was testified to, for instance, that the taxes were estimated (pp. 5801-5809, fols. 17403-17425) and charged up on a monthly basis until the actual tax payments were made, which sometimes did not occur until the end of the year. It
699 was further testified that discount on bills (p. 5810, fols. 17428-17429) was carried in a discount account until the end of the year, when it was credited to operations. It was further testified to that as to gas transferred at the end of the year 1918, all of the entries were erased or reversed and reclassifications made for the year as
700 a whole. It further appeared (pp. 6031-6033, fols. 18092–18099) that frequently bills were not paid until long after they were rendered.

As to the yearly period beginning November 1, 1918, and ending October 31, 1919, this year is plainly an improper basis for the finding as the Master said (fol. 24946, p. 8316) when Mr. Teele

put in his tabulation showing the book figures for the operations for that year: 701

> "This case is not going to turn on this exhibit. Now do not waste so much time on it. I do not know why it was put in. I will never take a paper if it takes a nominal year, so-called, and be guided by it."

Most of the witnesses admitted that the years of 1918 and 1919 were abnormal. Throughout the case the Master made frequent references to the fact that these years were abnormal and even went so far as to say on one occasion that he would not base his decision upon these abnormal years. 702

Counsel for respondent joined with the Master that this period about which we have been speaking was abnormal. 703

We quote from the record:

> "The Master: You do not claim, Judge Ransom, that because at this particular time things you have, matters that you use in the manufacture of gas, and of unusually high cost — that that must be the basis of the determination? 704
>
> Mr. Ransom: We do not, of course, rely upon anything which is abnormal or anything which is out of the ordinary as an average condition. That is, we do not stand merely upon what you may call war costs as such, or abnormally high prices as such. We present the whole situation" (p. 483, fols. 1447–1448). 705

Again, the Master said:

> "I will take judicial notice of it that everybody is profiteering or trying to" (p. 3679, fol. 11036).

706 Again:

"The Master: I will tell you, Mr. O'Brien, I do not care much about that; I am looking into the future very largely. These peculiar war conditions cannot in a sense make this case" (p. 4324, fol. 12972).

Again:

707 "The Master: I will tell you my view about it. In arriving at a conclusion on the cost of gas production I will have to discard largely the possibilities of the future, leaving that, as it ought to be left, to the development of the future" (p. 4329, fol. 12987).

Again:

708 "The Master: When I come to fixing what I think is the average usual proper cost of producing and delivering gas, I shall not be affected very much by this temporary condition that existed during the war. I will not be affected very much with the temporary, if it were temporary, increase in price of material either. I am going to try to get a
709 broad picture of the situation * * * the history of gas from time to time running back a number of years and the probabilities of the future" (p. 4347, fol. 13040).

Again:

"The Master: My present judgment is, unless I change my mind, that in view of the
710 peculiar and difficult situation arising in 1918 that I shall disregard that year entirely in my calculations. That is my present view about it" (pp. 4609-4610, fols. 13827-13828).

In the prior suit Mr. Justice Peckham, writing for this court, said (*Willcox* v. *Consolidated Gas Co.*, 212 U. S., 19, p. 54):

"It may possibly be, however, that a practical experience of the effect of the Acts by actual operation under them might prevent the complainant from obtaining a fair return, as already described, and in any event complainant ought to have the opportunity of again presenting its case to the court." 711

It is quite apparent that this court did not have in mind that the statute was to be put to a test on evidence of one or two abnormal years alone, but that the test should cover the whole period in which the statute was in force up to the time of bringing suit. The inquiry should be directed to the whole time the statute has been in operation and a full and complete inquiry should have been made. The inquiry covering one or two years is not only unfair, unjust and inadequate, but manifestly will lead to an attack upon the statute for every temporary change in valuations, prices of labor, materials or supplies. The courts will have a flood of rate cases and constant litigation over the constitutionality of such statutes and ordinances will be going on. This should be avoided. 712 713 714

There is ample authority to sustain our contention that the statute should not be so considered. Respondent's contention is virtually that this court should set aside an act of the Legislature because for a brief period owing to abnormal conditions its earnings have decreased although the same statute may have permitted the company excessive returns for the many years in which it has been operative. The years 1918 and 1919 were unprecedented and years in which multitudes of individuals were making great sacrifices; years in which many companies as well as indi- 715

716 viduals were content with a greatly diminished return.

In the recent case of the *Municipal Gas Company v. Public Service Commission, et al.*, the Court of Appeals said (225 N. Y., 89, page 98):

> "There was no need to go back to 1917 and disclose the earnings of earlier years.
717 The significance that they have is solely as evidence. They have no place in the complaint."

That case was before the Court of Appeals upon a demurrer, the sufficiency of allegations in the pleadings being the only question before the court and there was nothing before the court to
718 show that the year 1918 was abnormal or unusual in any respect.

The Court of Appeals distinctly said that the earnings of earlier years were relevant and that the trial court should consider such evidence. It goes without saying that if the case were to be decided upon the results of one year or one or
719 two abnormal years it would be wholly unnecessary and futile to receive evidence relating to prior years. Consequently, the Court of Appeals must have expected in that case, that the evidence of the earnings of earlier years would receive some weight. Furthermore, the intention of the Legislature must be given some consideration.
720 The Legislature has not attempted to fix the gas rate year by year. It did not reduce the rate for gas years prior to the war when this company was making a large profit, or considerably more than a fair return.

We have shown in another place in this brief

that this company enjoyed a return in excess of 6 per cent, during the period in question, of over $24,000,000. 721

Is it reasonable that the large profit in all these years should be absolutely disregarded and that the legality or illegality of the Act should hinge upon the return for 1918, and a part of 1919 alone, particularly so when it clearly appears that these were abnormal and unusual times? 722

If the Master's finding is correct that the statute should be destroyed upon the returns made in a year or a part of a year during an abnormal period, it would mean that the Legislature would be obliged to change the rate from year to year in order to adjust that rate to the profits shown by the company. If the Legislature were to attempt to change the rate year by year, would it not be met with the assertion that in years to come respondent might encounter conditions which would not give it a reasonable return? Would it not also be claimed that the Legislature should not be continually modifying rates? Further, the results for any year would not be known to the Legislature in time for action to be taken until another year had passed, and by that time the conditions might have changed. 723 724

We also wish to call the court's attention to the confusion which would result from a constant changing of rates and the difficulties which would arise in the adjustment of complaints. Every public utility would find its affairs in chaos and would protest against constant revisions. Many have already insisted that when a rate is fixed it should be allowed to remain in effect for a period of years so that they may adjust themselves to 725

726 the new conditions, and conduct their affairs without the turmoil of never-ending rate cases.

In the *Lincoln Gas & Electric Co.* v. *The City of Lincoln* (decided June 2, 1919), 250 U. S., 256, it appeared that the action was instituted in 1906, before the $1.00 rate, fixed by the city of Lincoln, had been tested. In the trial court the bill was
727 dismissed without prejudice to the commencement of a new action. An appeal was taken to this court where the decree was reversed and the cause remanded to the District Court with direction to refer it to a Master with leave to submit additional evidence (223 U. S., 349). Accordingly, a Master was appointed and he made a
728 report in September, 1914, finding that the rate ordinance was not confiscatory. Upon the rehearing before the Master, he considered a period from 1906 to substantially the time of his report, which was in 1914, approximately eight years. Mr. Justice Pitney, in writing for this court in that case, said (p. 268):

729 "Without going into details, we content ourselves with announcing our general conclusion that, having regard to the entire period under investigation, we are unable to say that the master erred in holding that the ordinance was not shown to have been confiscatory in its effect. It is probable that in the years 1907 and 1912, the net return was
730 close to the line, if not below it; but that in other years examined it was at least 7 per cent.; and there are too many doubtful items for us to adjudge the ordinance void, in the absence of an actual and timely test."

This court dismissed the bill, but without prejudice to the commencement of a new action to re-

strain the enforcement of the ordinance in question, if it should result after a practical test of the $1.00 rate since May 1, 1915, that respondent did not obtain a return which was compensatory. 731

The case of *Boyle* v. *St. Louis S. F. R. R. Co.*, 222 Fed. Rep., 539, p. 557, was a confiscatory case and the court there investigated a rate for passenger fares of two cents a mile, fixed by the 732
State Railroad Commission of the State of Arkansas. The opinion was written by District Judge Traiver, and in the course of which he said:

> "By adopting the four-year period for averaging the earnings and expenses, we are able to get a fairer result than by merely 733
> selecting one year which may be affected by peculiar conditions then prevailing. A four-year period, when the years are fairly normal will reflect more accurately the traffic and cost" (p. 557).

In the case of *Darnell* v. *Edwards*, 244 U. S., 564, this court had under consideration maximum 734
rates on logs fixed by the Mississippi Railroad Commission. The attack upon the rates fixed by the Commission was that they were so low as to be confiscatory. In the course of the opinion of the court, Mr. Justice Pitney said (p. 569):

> "It is well established that in a question of rate making there is a strong presumption in 735
> favor of the conclusions reached by an experienced administrative body after a full hearing. Besides this there was affirmative evidence before the district court to the effect that the rates were reasonable. The evidence for complainant tending to show that they

736 were nonremunerative, while based upon actual experience in the operation of the road, *yet relates to only a brief period when conditions were abnormal* * * *."

And in concluding his opinion, he further said:

"But it is sufficient for the present to say that the *experimental period was too brief* * * * *and conditions during the entire*
737 *period covered by the testimony have been too abnormal* to enable us to say that the Commission's rates are confiscatory."

The period under consideration in that case was from September 10, 1913, to March 31, 1914.

In the case of *Steenerson* v. *Great Northern*
738 *Railway Co.*, 72 N. W. Repr., 713, 721, the court said:

"If the Great Northern Company has made such large profits in the past that it was able to pay over large dividends and still accumulate such large amounts of surplus to invest in its properties or to carry along for
739 several years, it should be content to go along with smaller profits in such times of financial stringency as existed in 1894."

In the often quoted case of *Smyth* v. *Ames*, 169 U. S., 466, 546, this Court said:

"As said in the case last cited, 'Each case must depend upon its special facts and when
740 a court without assuming itself to prescribe rates, is required to determine whether the rates prescribed by the legislature for a corporation controlling a public highway are as an entirety so unjust as to destroy the value of its property for all the purposes for which it was required, its duty is to take into consideration the interest both of the public and of the owner of the property, together with

all other circumstances that are fairly to be considered in determining whether the legislature has under the guise of regulative rates exceeded its constitutional authority and practically deprived the owner of property without due process of law. * * * The utmost that any corporation, operating a public highway, can rightfully demand at the hands of the legislature when exerting its general powers is that it receive *what, under all the circumstances*, is such compensation for the use of its property as will be just both to it and to the public."

As was said by Mr. Justice GREENBAUM in *Kings County Lighting Company* v. *Lewis*, 110 Misc., pp. 204, 242–243:

"It is clear that confiscation may not be predicated upon the operations of the plaintiff for 1916 and 1917. As to the years 1917 and 1918, it must at the outset be said that those years were abnormal, owing to the war conditions then existing. Notwithstanding this abnormality, the year 1917 showed a fair return at an eighty-cent rate. * * *

As to the year 1918, the question that confronts one is whether confiscation should be based upon such a year, even if it be established with reasonable certainty that the plaintiff's income was thereby reduced to a point which concededly would not be ordinarily deemed an adequate return upon the capital invested. * * *

The operations of a fiscal year which was as abnormal as was the year 1918, lack the value of a normal year in determining the future.

In this connection it will be instructive to study the opinions of the courts as to what is

746 meant by a fair return and what period of time should be taken into account in determining the fair return and to what extent abnormal conditions may affect the question of the inadequacy of return."

In the light of these authorities we submit that under the circumstances of this case, the shortest
747 period which will reflect with any reasonable accuracy the return respondent has enjoyed under the statutory rate is not less than that selected by respondent in its bill of complaint, viz., 1906 to 1918, and especially is it true when one considers that included in this period is the abnormal year of 1918.

748 In the language of the *Connecticut Commission re Felix Telephone Company* (not yet reported):

> "These are war times and the Commission has time and time again emphasized the proposition that it would not guarantee normal dividends to utilities during the period of the war. The utility must bear its share
> 749 of the war's burdens, just as every other person and institution must bear its share. Even if it were necessary for the officers of the company to forego a portion of the usual salaries which they are receiving, in order to pay a portion of the increased cost of operation, this would be a more equitable solution of the problem than an increase in rates."

750 William L. Ransom, who acted as trial counsel for respondent, was formerly counsel to the defendant Public Service Commission, First District. While counsel for the Public Service Commission he filed a brief with Referee Hughes in the case of *Brooklyn Borough Gas Co.* v. *Wood-*

bury, supra. In that brief many of the contentions urged by appellants here were urged by Mr. Ransom there. For instance, he said on the question of taking an abnormal period as a test: 751

> "A finding of confiscation should not be predicated upon abnormal expenses of one year, for such expenses are not determinative of the earning requirements of a utility" (p. 135). 752

He also said:

> "A corporation which renders an essential public service under a public franchise has no constitutional right to an inflexible rate of return, and especially no right to insist that war-time costs have added so much 753 to the present value of its property that its rates must be increased sufficiently to enable it to pay the increased operating costs and still realize the same *rate* of return upon an enhanced value of its property. Corporations, even as individuals, are having to undergo diminished returns, because of increased expenses and unfavorable conditions 754 of demand and supply; and this plaintiff has no right to claim exemption from that rule of war-time sacrifice. Neither has the plaintiff and other corporations a right to ask this Court to 'aid in shifting to their patrons all the burdens of war costs, at a time when all individuals and businesses are having to assume a share of the Nation's 755 burden.' So the defendant Commission submits that even if it were true that plaintiff's return on its property has fallen temporarily to a point which would be deemed confiscatory if revealed by a fair average of years of normal conditions, the plaintiff would have no right to insist now on advanc-

ing its rates now to a point assuring continuance of its normal rate of return.

In the second place, the plaintiff corporation is not entitled to have the present adequacy of its rates tested by temporary and exigent costs of operation" (pp. 142-143, Ransom's brief, Brooklyn Borough case).

In the case of *Bronx Gas and Electric Co. v. City of New York*, 187 N. Y. Supp. 2, where the Appellate Division, First Department, had before it the question as to whether it was proper to order a reference in a gas confiscatory case, Mr. Justice Page said: (p. 3.)

"The acts which it is sought to have declared unconstitutional were passed 15 and 16 years ago. *The practical experience of the company under these acts up to January 1st, 1917, taking into consideration the changes that would be occasioned by the increase in the cost of materials and labor will be the determining factors in the case.*"

In the preceding points II and III we have shown that respondent made enormous profits in selling and distributing gas up to the end of 1917, and that in 1918 and 1919 respondent earned more than a fair return on the fair value of its property, but assuming for argument's sake that the return fell off in 1918 and 1919, the excessive earnings in prior years must be taken into account. That is the reason why it is important that the court should consider a proper period upon which to test the validity of the statute. We submit that allowing the errors committed by the master and the court below, there could be no pronouncement of confiscation had a reasonable lengthy period been considered.

The error, therefore, of the court below in not considering the period from 1906 to the date of trial, calls for a reversal of the judgment and a dismissal of the complaint. 761

POINT V

The respondent has accumulated a fund amounting to $11,801,659.48 for "Contingencies." The statute should not be declared confiscatory until this fund is exhausted. Temporary losses due to abnormal conditions should be debited against it. 762

Respondent has accumulated a fund amounting to $11,801,659.48 taken from the operating revenues in prior years, which is now carried in an account entitled "Contingencies." (Defts. Ex. AA243, p. 18234). This account was open on January 1, 1915 pursuant to resolution adopted by the executive committee and approved by the board of trustees of respondent in the manner following: 763

> "Resolved: That the title of the account heretofore designated as Renewal and Contingency, be from and after December 31, 1914, designated as Contingency and that, for each month thereafter there shall be credited thereto and charged to operating expenses an amount equal to Five (5.00¢) cents per thousand cubic feet of gas sold during said month, for the purpose of providing for contingencies or casualties, such as those caused by fire, flood, earthquake, insurrections or riot *or any other hazards;* no charges against the said Contingency account nor any appropriations therefrom to be made, except by authority of the Board of Trustees or of this Committee." (Deft's Ex. AA243, p. 18233.) 764 765

766 Prior to January 1, 1915, an account "Renewal and Contingency" was carried by respondent and credits to this account were made at 10¢ per thousand cubic feet of gas sold pursuant to a resolution dated May 31, 1905. (Defts. Ex. AA243, p. 18234). The balance of this account amounted to $9,358,358.69 on January 1, 1915.

767 The reasonableness of this reserve for "Renewal and Contingency" was discussed by Judge Hough in the former case. (*Consolidated Gas Co.* v. *New York*, 157 Fed. Rep. 849.)

On January 1, 1915, the above named account "Renewal and Contingency" was severed and two accounts were created from it, viz: "Con-

768 tingency" and "Renewals and Replacements." The balance above named, amounting to $9,358,358.69, was transferred to the new account called "Contingency." The account increased until January 1, 1918, when the balance was $11,801,659.48 where it has since remained.

"Contingency" is defined in the Standard

769 Dictionary as a possibility of happening; an event liable to occur but not determinable by any known rule of law.

A contingent fund is an amount reserved or set aside with which to meet specific exigencies and unforeseen events which may or may not happen. The purpose as disclosed by the company of the fund was to provide "for contingencies or

770 casualties such as those caused by fire, flood and earthquake, insurrections or riot, *or any other hazard.*" Whether the account is now in cash or whatever form, it does not appear, nor does it matter. If it is to be used for the purposes set forth in the resolution it must be in

some available form. Such a large fund should 771
be kept invested and not be allowed to remain idle. If invested in the plant, such betterments could be capitalized when necessary.

The sole question to determine is whether the temporary losses due to abnormal conditions is properly chargeable against this contingent fund the same as any other hazard of respondent's 772
business.

The appellants contend that this is one of the objects of this reserve. The resolution of the Board of Trustees is broad and sweeping and covers unusual happenings, some extremely improbable, such as flood, fire, earthquake, insurrections and riots and any other hazard, other 773
than those defined, are intended to be covered and to be taken care of by this reserve. Surely the consequences resulting from the Great War followed by the enormous inflation, labor disorders, and unsettled conditions are hazards encountered by every business and are provided for, as every unforeseen event by suitable reserve 774
or by contingent reserve funds.

When the fund was being accumulated, of course, the respondent did not know that the World War would take place, but, as we have stated, it is obvious that the fund was amassed for the purpose of taking care of unforeseen events and exigencies not then fairly contem- 775
plated. No part of the fund has ever been drawn upon by the company to take care of any of the contingencies specifically mentioned in the resolution. A similar contingent fund was considered by Special Master Graham in the case of the *Brooklyn Union Gas Company* v. *Nixon, et al.*,

776 and the contention here made by the appellants was advanced in that case. The Special Master did not express an opinion on this question, but charged the contingent fund with the sum of $150,000, being a portion of an extraordinary expense due to a strike at the plant of the Brooklyn Union Gas Company.

777 When the report of Special Master Graham came before Judge Mayer for review the point was again urged upon the court. The court said:

> "3. Contingent Fund. There is much argument upon this point. If there were an actual cash contingent fund on hand, it might be well contended that it should now be util-
> 778 ized to carry complainant over a confiscatory period. This so-called fund, however, does not exist as cash. It has gone into the property in one form or another. That dividends have been paid in the past does not produce a cash fund in the present."
>
> *Brooklyn Union Gas Co.* v. *Nixon, et al.*, —Fed. Rep.—(not reported).
> 779

It would seem, therefore, that the learned Judge adopted the contention made by the appellants that it was proper that this fund be now utilized to carry respondent over a confiscatory period but failed to apply the rule because it was not shown that the fund existed in actual cash. We
780 submit that this was immaterial and was not a reason for the nonapplication of the rule for the fund must be in some available form to carry out the intended purposes, as shown by the resolution of the Board of Trustees.

It is not clear why the learned Judge should approve the action of the Special Master in draw-

ing upon this fund for the expense occasioned by the strike and still refuse to charge against this fund the temporary losses due to the abnormal conditions. He said it could not be used to take care of abnormal conditions because not in cash —yet he draws upon it for a strike — the inconsistency of his position is apparent. 781

As we have already stated, there is no evidence whatever that this sum has been spent for capital purposes, extensions, betterments or anything else; but for the purpose of argument assume that it has been so spent for one of the above purposes mentioned. 782

One of two things must be true — either:

(a) The property in existence before the accumulation of this fund was actually worth the value of the capital issued against it and was kept up out of the earnings in accordance with law, in which case the betterments now representing the contingent fund would have no capital issued against them but the same should now be capitalized and the moneys used for contingencies; or 783 784

(b) The property in existence before the accumulation of this fund was not worth the capital issued against it, in which case $11,801,659.48 of betterments representing this fund would readily go to drive out watered capital, and there would be nothing to capitalize.

In either case the consumers should not be made to suffer for the over-capitalization of respondent prior to the accumulation of the fund. 785

The claim is made that the statutory rate fell short during the years 1918 and 1919 of affording respondent a fair return on the fair value

786 of its property used in the gas business. Our contention is that the stockholders have, through their constituted officers, accumulated this fund for the purpose of taking care of exigencies and abnormal situations such as this. Consequently, as soon as it appeared that the return fell short of what the company considered a fair return, then
787 the company should have treated this fund as a means of making up the loss, and in no event could the statute be declared confiscatory until it was shown that the fund was exhausted in making up such losses.

The fund was in the nature of an insurance, created out of the rate charged the consumer, to be used in any emergency, and so long as the
788 consumers provided the company with this insurance, it is improper to make them pay again for the losses. In other words, if the rule for which we are contending is not adopted then the consumers would be made to pay twice for the failure of a declared return during the abnormal periods
789 prevailing in 1918 and 1919.

Such a condition condemns itself and is contrary to fair dealing. The company may not thus enrich itself at the expense of the consumers. The only burden which the consumers must bear is to see to it that they pay a rate which will give the company a fair return; and if they pay more than is necessary in fat years, and the difference
790 is accumulated in an insurance fund, such as here, then they have discharged their full duty to the company and the fund must respond to make up any inadequacy of return. Otherwise, the amount paid by the company to consumers in prior years when the fund was accumulating, was too large

to the extent of the amount taken out to create 791
this fund. What we mean to say is that the rate
at that time was grossly exorbitant unless the
consumers were engaged in setting aside a re-
serve or insurance fund to take care of the day
when the company might meet a condition such
as confronted it in 1918 and 1919.

Assuming for the purpose of argument only 792
that the fair value of the company's property
and the rate of return it was entitled to enjoy
was correctly set forth by the learned Judge be-
low, it will be readily seen that this fund was
large enough to carry the company over a period
of several years without changing the statutory
rate and without any income from making and 793
selling gas for such period.

He found that the company, excluding fran-
chises, was enjoying a return of 5.08 per cent in
1918, 3.28 per cent in 1919 (p. 182a), and if fran-
chises were included, he found it was enjoying a
return of 4.53 per cent in 1918, and 2.92 per cent
in 1919; so that the fund would have to respond in 794
very small proportion to make up the diffeence be-
tween these percentages and 6 per cent return.

But aside and apart from this we have shown
that respondent enjoyed a fair return throughout.

POINT VI

795

The statute in question should not be declared unconstitutional unless the court finds that the average rate of return has been less than six per cent. for a considerable period of time.

The question: what rate of return is so low as
to result in confiscation of the property of the

796 respondent — is one for this Court to determine, but there are certain conditions which we shall emphasize.

It is not the province of the court to determine what rate of return should be allowed nor what is a fair rate of return, for these are problems for rate-making bodies such as Public Serv-
797 ice Commissions and Legislatures; but instead what rate makes the statute clearly illegal because property is being confiscated.

We have already pointed out that the rate of return should be averaged over a period of years, and in the instant case we contend that this period should be the period selected by the respondent
798 in its complaint, namely, 1906–1918, inclusive.

Appellants contend that this average return must be so low, so unreasonable and so unfair as to amount to confiscation. Certainly, an average return of 6 per cent would not amount to confiscation, nor 5 per cent when averaged over a period of years. It is doubtful if this Court
799 would declare a statute confiscatory if the return enjoyed under it averaged 4 per cent over a period of years.

The rate of return over a short period such as a year or two, we contend, is of no great consequence, and should not be considered alone. The return enjoyed might be 9 per cent in some years,
800 and 4 per cent in others. It is only when the average return falls so low as to confiscate property, that the statute must fail.

In determining the confiscatory nature of a given rate, many elements must be considered such as the locality and its customs and the risk

encountered in a given business. In the State of New York the Legislature has fixed the rate of interest upon loans and money invested at 6 per cent. 801

General Business Law, Sec. 370,

and any attempt to collect a higher rate is usury and cannot be enforced.

802

General Business Law, Secs. 371–2.

The Legislature has not changed this fixed rate of interest during abnormal periods, as it could have done, but it has remained in effect for a long period of time.

In the prior suit the rate of return was discussed by Mr. Justice Peckham, as follows: 803

> "There is no rule as to any particular rate which any corporation subject to legislative control in the matter has a right to obtain without legislative interference. It depends upon circumstances and locality. In this particular case with reference to the risk attending the business and the locality where it is carried on, the complainant is entitled to a return, if it is possible, of 6 per cent. upon the fair value of its property actually used in its business of supplying gas" (p. 20). 804

He further said, speaking of the risk:

> "In an investment in a gas company, such as complainant's, the risk is reduced almost to a minimum. It is a corporation, which in fact, as the court below remarks, monopolizes the gas service of the largest city of America, and is secure against competition under the circumstances in which it is placed, because it is a proposition almost unthinkable that the City of New York would, for purposes of making competition, permit the streets of the 805

806 city to be again torn up in order to allow the mains of another company to be laid all through them to supply gas which the present company can adequately supply. And, so far as it is given us to look into the future, it seems as certain as anything of such a nature can be, that the demand for gas will increase, and, at the reduced price, increase to a con-
807 siderable extent. An interest in such a business is as near a safe and secure investment as can be imagined with regard to any private manufacturing business, although it is recognized at the same time that there is a possible element of risk, even in such a business. The court below regarded it as the most favorably situated gas business in America, and added that all gas business is inherently
808 subject to many of the vicissitudes of manufacturing. Under the circumstances, the court held that a rate which would permit a return of six per cent. would be enough to avoid the charge of confiscation, and for the reason that a return of such an amount was the return ordinarily sought and obtained on investments of that degree of safety in the
809 City of New York.

Taking all facts into consideration, we concur with the court below on this question, and think complainant is entitled to six per cent. on the fair value of its property devoted to the public use." (P. 49.)

And Mr. Justice PECKHAM pointed out that
810 upon the valuation fixed by the Court below the rate was nearly 5½ per cent on the investment.

Willcox v. *Consolidated Gas Co.*, 212 U. S. 19, at 48.

In the recent decision of this Court in *Lincoln Gas & Elec. Co.* v. *Lincoln*, decided June 2, 1919

(250 U. S. 256), it was held that notwithstanding 811
the decision in the *Willcox* case a higher rate of return should be allowed in that case. But that decision in no way conflicts with the decision in the *Willcox* case, for it there appears that the legal rate of interest in Nebraska, where the cause of action arose, is 7 per cent, as compared with the legal rate of 6 per cent in the State of New 812
York. (See opinion of Mr. Justice PITNEY.) It is important also to note that in the *Lincoln* case this Court did not declare the law unconstitutional.

Mr. Justice PITNEY further said in that case:

> "complainant had not such a monopoly nor were its profits 'virtually guaranteed' in 813
> such a sense as to permit the public authorities to restrict it to a return of six per cent. upon its invested capital" (p. 267).

It seems to us that no one can successfully challenge the constitutionality of the statute so long as it allows a return of 6 per cent. We assert that even if it allowed a return of 5 or 5½ per 814
cent, in normal times, the Court would not pronounce it unconstitutional.

Respondent makes the same claim in this suit as to the rate of return that it made in the prior suit. In the prior suit respondent contended it was entitled to a return of from 8 per cent to 15 per cent, so that there is nothing new in regard 815
to its contention here that was not urged upon this Court in the prior suit.

Apropos of respondent's claim that it is entitled to a return of 8 per cent, we call the Court's attention to the fact that respondent has repeatedly loaned money to its affiliated companies

816 amounting into the millions, at 6 per cent. We quote from the testimony of Mr. Carter, secretary of the company:

> "Q. You know what I want; do not go over the whole year. I am talking about the recent stress, and I want to know how much money the company loaned, and then I am
817 going to ask you at what per cent. of interest they loaned it? A. I can answer the last question, that the uniform rate at which we lend money to our affiliated companies is six per cent." (p. 8544, fol. 25630).

If respondent really considers that anything less than 8 per cent is confiscatory, or that at
818 least 8 per cent is necessary to attract capital, why did it invest in securities which yield only 6 per cent? Such investment was not compulsory. The money so invested might have been used in dividends actually earned and other securities might have been purchased to yield a higher rate of return. This company has for the
819 last several years paid its stockholders only 7 per cent on their investments in its stock, and while this case was in progress respondent floated $25,000,000 worth of bonds at 7 per cent, which bonds, it appeared while the case was being tried, were selling in the market above par (pp. 15881-15883, fols. 47643-7).

820 The Supreme Court of Illinois in the case of *State Public Utilities Commission ex rel Springfield* v. *Springfield Gas & Electric Co.*, 291 Ill. 209, said:

> "No direct parallel can be drawn between a private corporation for the reason that to a greater or lesser extent the public has acquired an interest in the use of the property

devoted to public use and correlatively the company owes a duty to the public as well as to its stockholders and must charge no more than a reasonable rate for service rendered." 821

These great privileges given to the public utilities placed them in a different category than other business and manufacturing corporations, who do not have the use of the public streets and places. 822

The question which concerns the court as to what rate of return shall be deemed to be confiscatory has been passed on in a number of cases before the courts. In the case of *Kings County Lighting Co.* v. *Lewis* (*supra*), we refer to Mr. Justice GREENBAUM's decision contained in the following finding: 823

> "That during the wartime period in the city of New York 4¾% was and is a fair return upon the value of the property, including the land of plaintiff used in the public service."

The rate of return determined by the courts in normal pre-war times is not decisive or controlling in the abnormal war period which confronts us today. 824

This Court refused to declare this statute confiscatory, when it appeared that respondent enjoyed a return of almost 5½ per cent on the lower Court's valuation, and we assert here that a rate which in these temporarily abnormal, unusual and unprecedented times will yield this company a rate of as much as 3½ per cent to 6 per cent will not require a declaration on the part of the Court that the statute is thereby unconstitutional. 825

826 **POINT VII**

The sum of $7,781,000 allowed by the Master and the Court below for franchises should be excluded from the property upon which respondent is entitled to a return.

Aside and apart from the question of the validity of the franchises, which is subsequently
827 discussed, we contend that no return should be allowed on the franchises, for the reason that there is no proof in the record sustaining such a finding, but, to the contrary, there is positive testimony by Mr. Carter that the franchises are of nominal value.

We quote from the record:

828 "Q. * * * In speaking of a complaint you made in 1905, which was verified the 26th day of March, 1906, he asked you as follows: Q. You stated in this complaint further: 'There is no method or evidence by which the value of the tangible rights to lay and maintain mains and pipes in the streets can be determined. There exists no market or de-
829 mand for such right, permission or franchise. The price at which complainant's franchises or rights would sell under ordinary circumstances *is merely nominal.* The municipal authorities of the City of New York have never fixed any amount as the consideration for granting such franchises, and the right to lay mains and pipes in the streets has al-
830 ways been procurable from said municipal authorities without the payment of any monetary consideration therefor. The number of said franchises which may exist at any time has never been limited by said municipal authorities. The value of said right to occupy the streets does not exceed the cost of procuring such a right from the City, and

that cost is nominal.' Is that a correct extract from this sworn complaint and did you so state? A. Yes, sir. 831

Q. Is that correct? A. I assume it is a correct record, in which event that is what was stated.

Q. That question was put to you and you made that answer? A. Yes, sir" (p. 8438, fol. 25314). 832

Disregarding this evidence given by Mr. Carter, which is the only proof upon the subject in the record, the Master fixed the sum of $7,781,000 as the value of respondent's franchises because he concluded that he was bound by the valuation fixed in the decision of this Court in the prior case (*Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19). 833

The Master states:

"As I read the opinion of the Court in that case, the Court refused to disturb the value of $7,781,000 agreed upon as representing franchises. I quote from page 47:

"'We think that under the above facts the courts ought to accept the valuation of the franchises fixed and agreed upon under the Act of 1884 as conclusive at that time. The valuation was provided for in the Act, which was followed by the companies, and the agreement regarding it has been always recognized as valid, and the stock has been largely dealt in for more than twenty years (now thirty-four years) past on the basis of the validity of the valuation and of the stock issued by the company.' 834 835

Unless, therefore, there is force in the contention made by counsel for the Public Service Commission that one of the principal franchises included in this valuation has ex-

pired and that therefore that value no longer exists, I feel bound to accept that value of $7,781,000 for franchises" (p. 62a).

In other words, the Special Master reasons that because the valuation of $7,781,000 was attributed to the franchises at the time of the consolidation in the year 1884, and this Court did not disturb such a finding, he is justified in assuming, without any proof to that effect, that the same value exists to-day.

When the Master's report came before Judge Hand for review, the learned Judge stated:

> "If this case were *res integra* I should not hesitate to refuse any valuation to the company's franchise. On principle the case is very clear" (p. 147a).

Again he said:

> "I own that I am not clear whether or not the supreme court meant to declare that this value should exist perpetually as a means to drawing a profit of 6% or more, but it is clear enough that if it was worth that sum in 1884 and 1909 on any conceivable theory it is worth as much in 1920. Therefore, it appears to me that the master did all that he could under the circumstances in adding that sum to the 'rate base', at least until the supreme court shall indicate some contrary rule" (p. 147a).

Judge Hough, in his decision of December 20, 1907, in the prior case (*Consolidated Gas Co.* v. *City of New York*, 157 Federal Reports, 849) discusses the question of franchise value at consider-

able length. Speaking of the contention of re- 841
spondent that the rate fixed should give the company a fair return not only upon its tangible property, but also upon the right to use that property in the gas business, or franchise, he states:

> "As an original proposition, I believe this claim unsound. Return can be expected only from investment, and he that invests must 842
> part with something in the act of investing. He that hath not sown shall not reap."

When the case came before this Court for final review, it apparently based its conclusion upon different grounds from those announced in other similar cases.
843

Before considering these grounds and reasons upon which the Court based its conclusion, it is necessary to recite some facts relating to the early history of the respondent and the subsidiary companies, for this Court said:

> "What has been said herein regarding the value of the franchises in this case has been 844
> necessarily founded upon its own peculiar facts and the decision thereon can form no precedent in regard to the valuation of franchises generally, where the facts are not similar to those in the case before us. We simply accept the sum named as the value under the circumstances stated" (212 U. S., p. 48).

845

The peculiar facts found by the Court to exist in this case and which distinguished it from all others and upon which the Court based its conclusion were these:

By chapter 367 of the Laws of 1884, the Legislature authorized corporations engaging in manu-

846 facturing to consolidate by a method radically different from the existing law. Under the old law companies could consolidate, but the capital stock of the new company could not be larger in amount than the aggregate amount of capital of the consolidating companies. Under the Act of 1884, which it is said was passed at the request
847 of the respondent, the capital stock of the consolidated company could not be "larger in amount than the fair aggregate value of the property, franchises and rights of the several companies, thus to be consolidated."

This valuation of fair aggregate value was to be fixed by the directors of the various companies
848 approved by the stockholders.

Section 5 of this Act provides:

> "And such new corporations shall hold and enjoy the same, and all rights of property, privileges, franchises and interests in the same manner and to the same extent as if the said several companies so consolidated had continued to retain the title and transact the
849 business of such corporations."

Thus the Legislature forbade the consolidating companies to issue stock for more than the "fair aggregate value of the property, franchises and rights" of the several constituent companies.

The Legislature not only placed a prohibition in
850 this respect upon the company, but under Section 5 provided that the new company should accept the franchises of the old company with all their conditions and infirmities as held by the constituent companies. *One of the conditions on which each of the franchises was granted and held*

was that the State might reduce rates to a reasonable amount based on the actual property of the company. 851

Upon approval of the valuation agreement by the stockholders of the various companies, the stock of the new company was issued to the stockholders of the old company and the consolidation was then completed. 852

Shortly after the passage of this Act, six of the seven gas companies in New York City were merged into the present respondent, Consolidated Gas Company of New York. The Consolidated Company fixed its capitalization and attributed $7,781,000 to its "franchises and rights." This amount was the sum which the capitalization of the Consolidated Gas Company exceeded the asserted value of the tangible property of the constituent companies. The entire amount of capital stock was increased by the consolidation from $17,000,000 to $39,078,000. 853

On May 15, 1885, the Legislature appointed a special committee to investigate the capitalization of the Consolidated Gas Company. The report of this committee must be carefully scrutinized (Senate Document 47 Complt's Ex. 398, Defs. Ex. AA46, p. 17706). 854

Chairman John I. Gilbert of this committee, as the result of a deep study of the affairs of the various companies submitted a clear detailed report of the whole matter and its many phases. In his report he set forth detailed schedules showing: first, the actual capital contributed by the stockholders; second, the earnings invested; third, shares of stock issued. He also sets forth the book cost and the reproduction method of deter- 855

856 mining the fair valuation of the property of the constituent companies, and reached the conclusion "that from the books of the constituent companies their actual investment was not greater than $18,613,632.00." Speaking of franchises, he says that the existing earnings being based on excessive and unreasonable rate "formed no
857 proper element in valuing the respective properties of the constituent companies," and "the fair value of corporate properties ought not to be increased by the fact that the corporation has made excessive charges at the expense of the public."

The Committee was unanimous in its recom-
858 mendations and in many of its findings, but differed somewhat as to the valuation and the scope of their inquiry.

In striking contrast to the able, comprehensive and detailed report of Chairman Gilbert, we desire to call the attention of the Court to the crude and cursory report made by the other two mem-
859 bers of the Committee. A close reading of their report shows that the valuations placed upon the tangible property were the estimates made by the Presidents of three of the interested companies, and that they totally disregarded the actual capital contributed, book cost, or reproduction cost, and relied upon the self-serving declaration
860 of the Presidents because of the "difficulties attending the determination of value."

Considering the value attributed to the company's franchises, the Committee learned and reported the following facts, as bearing upon their value:

FIRST: The enormous dividends paid by 861
the gas companies.

SECOND: An agreement among the gas companies fixing the price of gas at a figure so that these enormous dividends could be paid.

THIRD: A law that prohibited the laying of any more gas pipes in the street.

FOURTH: A public in the habit of paying 862
this price without objection or protest.

FIFTH: The fact that there was in existence no statute, which made these high prices or excessive dividends unlawful.

After referring to the above facts, the Committee states:

"The valuation of the franchises com- 863
puted upon those dividends and that state of facts cannot be called a violation of the law, that expressly authorized it to be done unless such valuation was too high."

It will be noted that there was no clear, distinct evidence of the valuation of the franchise, 864
but the Committee proceeds to point out that the valuation attributed to the franchises was not, in their opinion, too high, relying upon the decision in the case of *People* v. *Albany Insurance Company*, 92 N. Y., 458, where the Court in passing upon the valuation of a franchise for taxation purposes, held that: "the amount of dividends 865
made or declared during the year are thus made simply in a measure of the annual value of the franchise upon which the tax is to be annually paid." (p. 461.)

Although there was no evidence before the Committee on the value of the franchises, the

866 Committee applied the rule for fixing their value for taxation purposes, and took the view that such a rule also fixed the value for capitalization purposes.

In its decision this Court reviews the report of the Legislative Committee appointed in 1885 and says:

867 "The committee, upon these facts, were of the opinion that the valuation of $7,781,000 for the franchises was not more than their fair aggregate value" (p. 46).

And the Court further says:

868 "We think that under the above facts the courts ought to accept the valuation of the franchises fixed and agreed upon under the act of 1884, as conclusive *at that time*" (p. 47).

It is one thing to speak of the value of the franchises as of 1884 and quite another to value same as of the time the prior decision was ren-
869 dered, or now. Since the complaint in the prior case was dismissed by the decision of this Court, the question of the value of the franchise was not of vital importance. This Court said, even accepting that value, still the statute was not confiscatory, but we do not construe the decision of the Court as deciding that the Courts must accept that as the present value of the franchise
870 or that the Courts must give it any value or even as the value at the time it rendered its decision.

The respondent now contends and the Special Master has so found, that the valuation placed upon the tangible property, as well as the franchises, under the act of 1884, is conclusive for all

time, and thereby gives the company a vested 871
right in those valuations and made that value "property" of which the respondent cannot be deprived without due process of law.

Surely no such intention to give the company a vested right in these valuations can be imputed to the Legislature, for the very acts of the Legislature itself show conclusively and beyond any 872
doubt that such was not its intention, and as we have argued elsewhere the Legislature could not so far as rate making was concerned, give any vested or binding value to franchises of this character so as to bind the Legislature in the future.

This Court, in its decision, recognized the fact 873
that the value of the franchise as fixed by the companies in 1884, may be totally different today, for it says:

> "Its past value was founded upon the opportunity of obtaining these enormous and excessive returns upon the property of the company, without legislative interference 874
> with the price for the supply of gas, but that immunity for the future was, of course, uncertain, and the moment it ceased and the legislature reduced the earnings to a reasonable sum, the great value of the franchise would be at once and unfavorably affected, but how much so it is not possible for us now to see. The value would most certainly not 875
> increase" (p. 47).

Assuming without conceding that the valuation was fixed by the companies at a certain sum in the year 1884, because of the opportunity of obtaining these enormous and excessive returns,

876 and other reasons found by the Committee, it is plain that the value of the franchise, if it had any, is but little under present conditions, and Mr. Carter, the Vice-President of the respondent, has so testified (p. 8438).

Treating the question, generally, as to whether the value of franchises should be included or ex-
877 cluded from the property upon which the company is entitled to a return, we have but to recall the opinion of Judge Hough in the prior case, wherein he says, in answer to the company's contention that the franchise value should be included:

> "As a general proposition I believe this
878 claim unsound." (157 Fed. 849, p. 873.)

The case of *Lincoln Gas & Electric Co.* v. *The City of Lincoln*, 182 Fed. Rep., 926, follows the general rule, excluding franchise value, District Judge W. H. Munger, in explaining the exclusion of franchise value, says (p. 928):

879 > "I do not allow anything as the value of complainant's franchise; it does not appear from the allegations of the bill or proofs that anything was paid to the city for the franchise; the city simply granted to complainant, without compensation, the right to use the public streets and the alleys for the purpose of constructing and operating its plant.
880 This was a mere right and privilege to complainant and did not involve the expenditure of money; while it is true a franchise is a property right, which will protect complainant in the use of the streets and alleys for the purposes expressed, yet it involves no investment of money, complainant's invest-

ment being in its tangible property under authority of the franchise, and the public ought not to be taxed for a privilege which it has voluntarily granted. I do not think that there is anything in the case of *Willcox* v. *Consolidated Gas Company*, 212 U. S., 19, which conflicts with this view." 881

In the recent case of *Bronx Gas & Electric Company* v. *Public Service Commission*, 190 App. Div. 13, at page 25, Mr. Justice PAGE says: 882

"We observe also that the plaintiff seeks to have its franchise included in its property upon the value of which an adequate return is to be estimated. It has been repeatedly held, and is now settled, that the franchise which is obtained from the State is not property devoted to the public use, upon the value of which it is entitled to a return from the rate charged for its service." 883

The weight of authority is to the effect that such a franchise value should be excluded from the property upon which the company is entitled to a return. 884

See:

Spring Valley Water Works v. *City of San Francisco*, 192 Fed. Rep. 137.

Cumberland T. & T. Co. v. *City of Louisville*, 187 Fed. Rep. 637.

Home Tel. Co. v. *City of Carthage*, 139 So. Western, 547. 885

But, as we shall see, there are other reasons why the franchises of this company should not be included.

886 **APPELLANTS CONTEND THE RESPONDENT HAS NO RIGHTS IN THE STREETS OF THE CITY OF NEW YORK.**

Respondent upon the trial of this case claimed that it owned six separate and distinct franchises, all of which it claimed upon the former trial in 1906. As to these franchises Judge
887 Hough stated in his opinion (*Consolidated Gas Company* v. *City N. Y.* 157 Fed. 849 and 880):

> "Under these cases complainant is in the possession, enjoyment and ownership of the franchises originally granted to the Harlem Gas Light Company, the Knickerbocker Company and the Anthracite Gas Lighting & Heating Company; and these franchises are
888 sufficient to cover all that complainant does, and permit all it requires for Manhattan Island. Without expressing any opinion as to the other alleged franchises, I consider this finding sufficient to support the value heretofore stated."

Of the three franchises mentioned by Judge
889 Hough in 1906, two, the Harlem franchise and the Knickerbocker franchise, covered only property north of 79th Street, the third franchise claimed to have been received by assignment from the Anthracite Gas Lighting & Heating Company was the only one which covered the entire City and this franchise, it appears from the records of
890 this case, *expired by limitation in 1913.* (Ex. 38, p. 10095.)

Consequently the claim to the right to lay mains in the entire City of New York is no longer existent, and it is peculiarly erroneous to place the tremendous value of $7,781,000 upon such non-existent rights.

The facts as to the so-called Anthracite fran- 891
chise are as follows:

The Anthracite Gas Lighting & Heating Company was organized under the General Manufacturing Act of 1848 (Chap. 40, Laws of 1848), by certificate filed May 28, 1863 (Exhibit 57 received, p. 113).

The Common Council of the City of New York 892
adopted a resolution September 17, 1863, which granted the Anthracite Gas Lighting & Heating Company the right "to lay pipes and mains for conducting gas for illuminating and heating and other purposes through the streets, avenues, lanes, alleys, squares and other public places in the City of New York for a period of fifty years 893
as provided by the General Manufacturing Laws of the State of New York" (Exhibit 58 received, p. 113). Consequently this, the only franchise of that company, so-called, expired on September 17, 1913.

By mesne assignments (Exhibits 59, 60, 62, 63, 64, 66, 67, pp. 113-117, and Exhibit 21, p. 80) 894
this franchise is alleged to have been passed to the respondent, although it is not claimed that any additional rights were ever acquired by the respondent company which would give this franchise a greater value than it had in the hands of its original owner.

In the case of *Ghee* v. *Northern Union Gas Co.* 895
158 N. Y., 510, at p. 513, the court said, in speaking of the local consent to be obtained from the municipal authorities:

> "At the threshold of the consideration of these questions it will be well to have in mind the legal effect of the consent which the

896 municipal authorities are authorized to give by the Transportation Corporations Act. It operates to create a franchise by which is vested in the corporation receiving it a perpetual and indefeasible interest in the land constituting the streets of a municipality. It is true that the franchise comes from the state, but the act of the local authorities, who
897 represent the state by its permission and for that purpose, constitutes the act upon which the law operates to create the franchise. The state might grant the franchise directly to the corporation without the consent of the local authorities, and has done so in many instances; but the tendency of later years, which is well grounded in reason, is for the state to confer upon the local municipal au-
898 thorities the right to represent it in the matter of granting franchises to the extent that the final act necessary to the creation of franchises must be exercised by such authorities. The legal effect of the consent, therefore, is the same as if the local authorities in form granted the franchise and the interest
899 in the land. (*People ex rel. Woodhaven Gas Co.* v. *Deehan*, 153 N. Y., 528)."

Respondent claims that it owns certain other franchises which uphold its claim of a tremendous value for its franchise rights. These franchises are the so-called New York franchise, the so-called Manhattan franchise, and the so-called
900 Metropolitan franchise. As to these, entirely aside from the fact that Judge Hogan disregarded them in his decision in the prior case, it is sufficient to say that all had expired long prior to the commencement of the present action. The Manhattan franchise (Laws of 1830, Chapter 59,

Exhibit 5, p. 55) was a franchise covering the entire City, but contained the usual provision: "that no public street, lane or highway of the City of New York shall be dug into or in any way injured or defaced without permission of the Corporation of said City first having been obtained." 901

Pursuant to this provision the Manhattan Gas Light Company obtained municipal grants or secondary franchises (Exhibits 176-177, pp. 16283, 16285). This secondary franchise granted the company the right until May 5, 1868, only, to lay pipes in the City of New York between Canal Street and 42nd Street. 902

The so-called New York franchise (Exhibit 2, p. 15924) is a statute in form similar to the law which incorporated the Manhattan Gas Light Company, being Chapter 85 of the Laws of 1823, and provided similarly that no street should be dug into without the permission of the City first having been obtained. Pursuant to this provision the New York Company obtained a Municipal Grant (Exhibit 46, p. 16050). This Municipal Grant, dated May 12, 1823, gave the company the right to lay pipes south of Grand Street until the 12th day of May, 1853. There is no claim that this permission has ever been renewed. 903 904

The Metropolitan Gas Light Company franchise, comprised in Chapter 445 of the Laws of 1855 (Exhibit 9, p. 15933), contained the same provision relating to the necessity of obtaining the consent of the municipality before digging into the streets and pursuant to that provision a Municipal Grant was obtained (Exhibit 50, p. 16082). This Municipal Grant was adopted June 905

906 9, 1858, and was for a period of thirty (30) years, consequently it expired in June, 1888.

Although the respondent went to great pains in an endeavor to distinguish between these different franchises and to show that now that the Anthracite franchise has lapsed, certain other franchises have come to life, yet the facts
907 and the law are plain with the exception of the Knickerbocker franchise and the Harlem franchise which was extended only above 79th Street, and as to the Harlem franchise there is some question because of the fact that the Harlem Gas Light Company, organized under the Gas Light Companies Act of 1848 by certificate of incor-
908 poration dated February 2, 1855 (Exhibit 164, p. 16253), had a corporate existence of only fifty years.

As to all of the remaining franchises an examination of the record shows that they have all expired. The effects of the expiration of the Municipal Grant, in the case of these franchises,
909 have never been adjudicated in this State. Respondent relied at the trial upon the opinion in the case of

> *City of New York* v. *The New York Mutual Gas Light Company*, 135 App. Div. 260-262; 140 App. Div. 911, 207 N. Y. 647.

910

There it was held that the City could not maintain an action to dislodge the Mutual Gas Company from the streets of the City, although its right acquired from municipal authorities had expired. This case, however, is by no means controlling here. In the first place, the Mutual

Charter, aside from the provision which appears 911
in all of the franchises claimed by respondent that "no public street or highway in the City of New York shall be dug into, injured or defaced without permission of the municipal authorities thereof first having been obtained," contained an unusual provision which appears in none of the franchises claimed by the respondent. 912

This unusual provision which negatives the above quoted provision and absolutely distinguishes the Mutual franchise from any claim by the respondent is as follows:

> "Provided that such permission of the Municipal authorities shall not be required if the majority of the owners at interest of 913
> the property immediately adjoining the property of the city or highway so dug into, injured or defaced, shall give their consent thereto in writing."

and proof was offered in that case that such consent had been obtained from the adjoining property owners. This, of course, absolutely dis- 914
tinguishes that case from the instant case.

Respondent relied before the Master upon

> "*City of New York against Central Union Gas Company*, New York Law Journal of December 13, 1917."

No great stress is laid upon this case, however, 915
undoubtedly for the reason that the decision states that: "Defendants have satisfactorily established that as a matter of fact they are in possession of their franchise under grants given to their predecessors by early local authorities

916 and duly assigned to them. Plaintiff has * * * failed to impeach their validity."

The only case that involves the particular franchises of the respondent is:

> "*Matter of application of the Attorney General*, 56 Misc., 49."

917 which was decided during the pendency of the former action and in terms refusing to decide the question of the validity of the franchises but merely denying the right of the Attorney-General to sue during the pendency of the former suit. The vital distinction between all these cases and the instant case, lies in the fact that all of
918 them were brought by the City or by the public authorities to oust the alleged owners of the franchises from the streets of the city and in no way involved the value of the rights in the possession of the corporations, nor their exact status, that is whether the company can be said to be in the streets as licensee or tenant at sufferance or
919 continuing trespasser.

It is not necessary to decide such a question in any action brought to oust the corporation from the streets, but certainly it is of the utmost importance here. For how can it be maintained for a moment that the right to lay pipes and mains in the streets of the city of New York,
920 which existed in full force and effect in 1884, was no more valuable than occupancy of the street as a continuing trespasser. The fact that the city has taken no action to oust this company, from the streets, upon which inaction the Master relies (Opinion, pp. 62a and 63a), might perhaps

be of aid and comfort to the respondent as assuring it that it might continue for some time to be a trespasser, but how can it give value to its occupancy as a trespasser. 921

In the case of *Ghee* v. *Northern Union Gas Co.* (Supra), it was held that the consent required from the municipality to confer a franchise upon a gas lighting corporation can be given only by the municipal assembly through appropriate ordinances. 922

When this consent or secondary franchise has been granted the administrative officers of the city, such as Commissioner of Streets or Highways can be compelled by mandamus to allow the company to exercise its rights.

It is the administrative officers of the city and not the municipal assembly that can be forced into action by mandamus, though the opinion of the learned court below would seem to express a contrary view. 923

Here, the secondary franchise has expired and until a new consent from the municipal authorities has been obtained, the company is a trespasser and liable to ouster as such. 924

The mere dead right to have its pipes in the streets, or rather the hope that the maintenance of its pipes in the streets will never be interfered with, is far from a right which can be valuable in a rate case and upon which the consumers must pay a return. At any time the city may descend upon this company and maintain its right to dislodge the pipes unlawfully in the streets. It seems the greatest irony to have the Master in a Court of Equity maintain that the consumers of this city should pay to this respondent 8 per 925

926 cent upon $7,781,000, or approximately $600,000 per year, because, without warrant of law and as a trespasser it occupies the city streets.

We respectfully but insistently maintain that the allowance of any value for franchise rights to the respondent company would be the grossest injustice upon the consumers.

927

POINT VIII

The Master and the Court below have included in the property upon which respondent is entitled to a return, various properties which are not used and useful in respondent's gas business and should be excluded.

928 *1. Block 985, Lots 7, 19 and 20.*

These properties should come out because they were leased to a coal company and not used by respondent.

According to Witness Alrich for respondent, Lots 19 and 20 and the easterly portion of Lot 7 (Respt's Ex. 178, p. 4 thereof) were unimproved 929 up to October 13, 1913, except for fences and were not used by the company for gas purposes, being leased to a coal company (pp. 7884–7885).

Since October 13, 1913, this property has been occupied as a storage for large pipe and fittings, and all distributing fitting shop comprised several frame structures (pp. 456, 457, 7884).

930 The western portion of Lot 7 is occupied by two, 250,000 cubic feet gas holders which bear evidence of being very old and by a boiler house for use in connection with the holders (pp. 455–456).

Mr. Alrich, respondent's witness, did not know whether they contained any gas, could not tell

when they had last been used, and had made no examination of the holders to determine their condition. The testimony further shows that these two holders were written off in 1919 (p. 11979), and they were not used after October, 1915 (pp. 8970–8971). They should, therefore, have been excluded from the rate base. The Court below struck off $100,000 as an estimate, or 57 per cent of the above Lot 7, but there is no reason why the whole should not have been excluded (p. 174a). 931 932

2. Block 952, Lots 29 and 30.

These should be excluded entirely. The Master included them in the rate base and the Court below did likewise (p. 175a). 933

These lots, together with the property located thereon, are not reasonably used and they were and are not necessary for the proper and economic production and distribution of gas.

Mr. Hine, gas engineer, stated that they were not needed in his opinion (pp. 11580–11581).

Lot 30 is a brick structure which Witness Ulrich testified was used for storage purposes (p. 271; also Respt's Ex. 176, p. 16283). 934

The testimony shows, however, that in 1919 very little use was made of this building, there being a few articles stored on the first floor and the other floors being entirely vacant (pp. 11999–12000). 935

Lot 29 was unimproved except for a fence, and respondent's witness stated that it was used for the storage of coal, pipe, etc. (pp. 466–467).

The appellants contend that although these premises may have been used to a slight extent,

936 they were not reasonably necessary for the production and distribution of gas by respondent. There is a tennis court in the north corner of Block 952, Lot 7 (pp. 11980-11981); there are several storage buildings on Block 978, Lot 6, and there is considerable space available for storage on Block 987, Lot 37 (p. 11980). Ample
937 storage upon these lots last mentioned was available and so the inclusion of a small corner lot for coal storage purposes, such as the lot in question, is certainly not justified. The Court below refused to upset the discretion of the officers (p. 175a). But this was, we contend, error and these lots should be excluded.

938 *3. The westerly 300 feet of Block 1157, Lot 1, should be excluded from the property upon which respondent is entitled to a return.*

The Master included this entire property in the rate base and so did the Court below (p. 175a).

The westerly 300 feet of this block and lot
939 (Respt's Ex. 178, p. 10 thereof) are not and have not during the period of 1906, to date, been reasonably used and useful for the necessary, proper and economic production and distribution of gas to the companies comprising the Consolidated system. At the present time this portion of the lot is unoccupied, two ancient 300 cubic feet
940 holders and four 325,000 cubic feet holders having been removed and retired in 1917 (p. 12011). The westerly end of this lot is at present occupied by two 4,000,000 cubic feet holders, erected in 1892 and 1900 respectively, together with a pumping station, boiler house, etc., used in connection with these holders.

Mr. Hine testified that said westerly 300 feet was not needed and was not necessary for the proper and economical distribution of gas by respondent (pp. 11583–11587). 941

4. Block 1683, Lot 18, Block 1712, Lot 2, and the easterly 281 feet of Block 1704, Lot 5, should be excluded from the property upon which respondent is entitled to a return. 942

The Court below refused to exclude these lots and we urge that this was error (p. 175a).

The following parcels, together with the property located thereon, comprising a part of the so-called 111th Street station (Respt's Ex. 178, p. 16286), should be excluded from this case from 1906 to date, since they were not reasonably used and useful and were not necessary for the proper and economical conduct of the gas business of respondent company. 943

The testimony shows that Block 1683, Lot 18, has been occupied from 1906 to date by a storage building, storage sheds, and as a storage yard (pp. 617, 619; fols. 1851–1857); Block 1682, Lots 8 and 11, have been occupied from 1906 to date by two 5,000,000 cubic foot holders with a boiler house and pumping station located between them (pp. 287–288, fols. 860–862; p. 586, fols. 1757–1758); that the westerly 107 feet of Block 1704 was owned by respondent company from 1906 to June 28, 1912, being occupied by an office, etc. (pp. 7904–7905, fols. 23711–23713); that the westerly 225 feet of Block 1704, Lot 5 (shown as Parcel 2 on Applt's Ex. AA126, p. 18077), is now occupied by a stable, a garage, an emergency wagon garage, a wagon shed, etc., located on the 944 945

946 westerly portion, the easterly portion being used for storage purposes (pp. 288–289, fols. 862–865; pp. 604–607, fols. 1810–1820); and that this parcel has been somewhat similarly occupied since 1906; that the easterly 281 feet of Block 1704, Lot 5, is occupied by an office of the National Coal & Coke Company, a coke screening plant and coke
947 handling system for Astoria coke, and as a coke and coal storage yard, and prior to the erection of this coke handling plant was used for storage purposes (pp. 288–289, fols. 864–866; pp. 607–617, fols. 1821–1850); and that Block 1712, Lot 2, is now occupied by a coke conveyor used for taking coke from barges in the river to the screening
948 plant on Block 1704 (pp. 607–611, fols. 1821–1850).

The testimony also shows that in 1906, there were certain parts of an old gas manufacturing plant located on Block 1704, Lot 6, but that at no time since 1906 was any of this plant used for making gas.

949 Appellants contend that there is sufficient storage space available on the easterly portion of Parcel 2, Block 1704 (Applts.' Ex. 126, p. 15) and on the space at the corners of Block 1682, Lots 8 and 11, which is vacant, since the holders are circular in shape, to take care of all the needs of respondent for storage in this section of the city,
950 and that the full utilization of this space would render unnecessary the use of Block 1683, Lot 18.

With respect to the westerly 281 feet of Block 1704, Lot 5, and Block 1712, Lot 2, it appears that these parcels are not used for the purposes of the respondent company and therefore should not be included as used and useful for the purposes of this case.

Mr. Hine testified that these parcels were not 951
needed and were not necessary for the proper and economical distribution of gas in territory supplied by respondent (pp. 11588-11592, fols. 34762-34775).

5. The Astoria plant now building included in the Master's rate base at $2,250,000 (63rd finding, p. 38a) and by the court below at $4,500,000 (p. 952
181a) should be excluded from the rate base.

The new Astoria plant, at the time this trial closed, was not built and was not usable. There is no reason whatsoever why the present consumers should be charged with it.

It is well settled that the property which is not actually being used should be excluded. 953

> *Spring Valley Water Co. vs. City & County of San Francisco, et al.*, 165 Fed. Rep. 667, p. 697.

There Judge Farrington said, (p. 697):

> " It is not just to compel consumers to pay for more than they receive, or to pay complainant an income on property which is not actually being used in gathering and furnishing water. * * * When the property does come into necessary service, the company is entitled to have it credited at its then fair and reasoable value for rate-fixing purposes. *San Diego L. & T. Co.* v. *National City*, (C. C.) 74 Fed., 79, 83." 954 955

In the prior suit Judge Hough excluded entirely the Astoria plant because it was an enterprise merely projected and was not based upon any actually existing investment at the time of

956 the inquiry. (See *Consolidated Gas Co. v. City of New York*, 157 Fed. Rep. 849, at pp. 860-861).

The evidence in regard to the building of this new plant at Astoria is very meagre. It was in the closing days of the trial (Feb. 27, 1920) when the subject was brought up (p. 14330). The summary of this testimony was given by Mr.

957 Addicks witness for respondent. He said:

"We have been considering and have taken steps to increase our capacity.

Q. Ground was broken some time ago for a new plant? A. Yes, sir.

Q. How large a plant? A. 30,000,000 cubic feet.

* * * * * * *

958 Q. At what cost?

(This was objected to as not proper rebuttal and upon other grounds.)

A. At an estimated cost as I recall it, of $4,500,000.

The Master: That is water or coal? A. Water.

The Master: Does that include land cost?

959 A. No, sir.

The Master: I take it you intend to put it over at Astoria? A. Yes, sir" (p. 14330).

* * * * * * *

"The Master: You mean just to have another water gas unit over at your Astoria plant? A. Another unit adjoining the present 30,000,000 unit" (p. 14331).

960 It was not then built (p. 14332).

Mr. Addicks testified that he expected to turn out 30,000,000 cubic feet a day in this plant, (p. 14334) and it was being built by the Astoria Company and not the respondent (p. 14334).

This is substantially all of the evidence relating

to this new plant. It will be seen that it was not 961
built at the time of the trial. How much it would cost was only the hearsay estimate of Mr. Addicks. The expense of it certainly should not be borne by the present consumers and it should have been entirely eliminated from the rate base; yet the court below, on this loose hearsay evidence of the estimated cost of a proposed new 962
plant, allowed it all in the rate base. This was reversible error.

It might occur to the Court to know what it actually cost and whether it was necessary. But there is no evidence of this. It should be taken care of by the consumers who are to have the benefit of it, and not the consumers using gas at 963
the time the trial took place.

6. The Astoria plant should be excluded from the rate base.

The Master included the Astoria plant as of December 31, 1918, in the sum of $17,169,342.57. (63rd Finding, pp. 38a, 69a). The Court below 964
included the Astoria plant in the sum of $15,497,-615 (p. 181a).

Under preceding Point III we have argued that this plant should be excluded. The reasons for its exclusion are that respondent did not claim it as a part of the used and useful property and did not prove its fair value. It does not appear 965
in the evidence what the fair value of the property was at the time of the trial. Respondent offered no proof concerning its fair value, and consequently the appellants did not attempt to prove it. It further appeared that the land is carried on the books at a greater sum than the amount paid for it (p. 12878), and the plant was

966 designed to take care of future developments. Before it could possibly be included in the rate base there would have to be proof as to how much of the property was used and useful in making and distributing gas, its age and present condition and how much the property had depreciated. Since we have argued this quite fully under pre-
967 ceding Point III we shall not again repeat the argument here. We contend, however, that it was error for the Court below to include it in the rate base at any sum.

7. The conduits jointly used included by the Court below in the rate base at $4,440,000, and by the Master in the sum of $5,178,614.58, should be
968 *excluded from the rate base.*

The Master, in his opinion, says he included the entire investment in the Astoria tunnel (p. 69a). The Court below included all of the conduits or tunnels used by the Astoria Company rather than the Astoria tunnel alone. He figured 57 per cent of the total cost of all these tunnels,
969 $6,723,037.29 or $3,832,131.25. Then instead of taking the last mentioned figure in the rate base he estimated it, without any evidence to sustain the estimate, at $4,400,000, which he said was 65 per cent, plus all, on the supposition that the Astoria capacity would be raised by the new plant from 70,000,000 to 80,000,000 cubic feet a day.
970 (pp. 178a, 179a.)

(a) The Astoria Tunnel.

This tunnel is owned by the East River Gas Company. Respondent claims an investment in this tunnel of only $2,975,114.08, while the Master allowed, as against this figure, $5,178,614.58. This is on the basis of 57.45 per cent

used by the respondent, and 42.55 per cent used by the other companies (p. 13064, fol. 39190). 971

Just why the Court should allow anything in the rate base for this tunnel, which is owned by another company, is not clear. All that respondent claims in its operating expenses for this tunnel is $379,190.73 (pp. 11776, 3275-3276). No allowance should be made for it in the rate base. 972

(*b*) *The Ravenswood Tunnel.*

This tunnel is valued at $700,000 only (p. 11777), and the only charge in 1918 for this tunnel was $51,172.80, calculated at 12 per cent upon 60.92 per cent of the investment of the tunnel.

The Master allowed nothing for this tunnel 973
(p. 38a and 69a). The Court below assumed it was used by other companies than the respondent (p. 167a) and estimated its fair value (p. 167a). Both tunnels were lumped at $6,723,037.29 and then 57 per cent of this amount mentioned but not taken. This would be for both tunnels $3,832,-131.25 (p. 178a). 974

But the learned Judge was not satisfied with this amount so he raised it to $4,400,000 (p. 179b) or 65 per cent, and in order to do it he increased the capacity of the Astoria plant 30,000,-000 million cubic feet a day.

Where is the evidence to sustain this arbitrary 975
figure, adopted by the learned Court. We submit there is none. The Court has allowed taxes and maintenance on these tunnels (pp. 170a, 166a and 167a) and now includes 65 per cent of a so-called investment in them in the rate base.

This tunnel, as well as the Astoria Tunnel, should be excluded from the fair value upon which a return is allowed, upon the grounds that the

976 fair value thereof was not proved, and that there was no competent evidence upon which an allocation of the use by the respective companies could be based.

POINT IX

The 57th Street office building was not an adequate
977 **improvement upon the land upon which it was erected and should not be included in the rate base. Moreover, had respondent rented equivalent office space nearby, there would have been an annual saving of at least $36,000 which should be credited in this case to operating expenses.**

The Master, so far as this branch office and the display room are concerned, followed the same
978 procedure as he did in all other instances where the appellants showed clearly that the acts of the operating officials were wanting in sound judgment, and he has thereby required the consumers to suffer the loss which followed the lack of good judgment of such officials. He refused apparently to interfere with the judgment of the officers of
979 the respondent upon the ground that the appellants were required to show bad faith (pp. 10578-10581, fols. 31732-31741).

In no instance where the appellants challenged the judgment of the operating officials did the Master substitute his judgment for their judgment. He approved every act on their part re-
980 gardless of the testimony, even going so far as to hold that the tennis court upon what is known as the Kingsbridge holder property was used and useful in the gas business, although the officials of the company admitted upon the witness stand that this property was in the market for sale

because respondent did not need it in its business 981
(pp. 14536-14537).

The Court below also allowed the full amount for this property in the rate base, viz., $694,718.47 (p. 180a).

The appellants are not required to show that the operating officials were guilty of bad faith.

It is simply a question of whether the operating 982
officials used sound or unsound judgment, and if they used unsound judgment then the gas consumers ought not to bear the additional burden which follows.

This rule is a reasonable one and should have been followed by the Master. Such a rule was followed by Judge Hough in the prior suit. There 983
he held that a great many pieces of property which the company claimed were used and useful in the gas business were not necessary, and excluded them, and so we say here that the record is clear so far as this particular building is concerned that the operating officials exercised bad judgment in acquiring the land and erecting the 984
building during war times at war prices, and that the company had no real need for such a building.

The ridiculousness of having such a high-priced building at such location is readily seen when attention is called to the fact that the entire third floor of this three story building is used to store radiators (p. 11387). 985

As we have said elsewhere, the rule is now well settled and is to the effect that property which has not been wisely and advantageously used to serve the public cannot be included unless the evidence

996 have erected a building suitable for its needs upon the same plot by the use of only 50 feet front, and thereby have an additional 70 feet for sale or rent (p. 11403, fols. 34208-34210).

Mr. Boylan prepared a sketch of the proposed building which would have been an adequate improvement upon the property and upon which
997 the company could have obtained a gross annual rent of $251,000 (see Defts. Ex. AA-260, p. 11404).

He further testified that had the company purchased land on 56th Street or 55th Street, between the same blocks, or on 54th Street, it could have made a net saving on the land alone of over
998 $100,000 (p. 11421, fols. 34264-34265). By buying on 57th Street the company unnecessarily expended $100,000 (p. 11422, fol. 34265).

We submit that so far as the 57th Street office building is concerned there ought to be credited for gas operations each year at least $36,000. The gas consumers should not be required to carry
999 this extravagant expenditure.

POINT X

Power to regulate gas rates is a sovereign power of the State; one Legislature may not bind a succeeding Legislature, and any act of a corporation under a general or special law does not of itself establish a prop-
1000 **erty or a contract right which limits the Legislature's power to regulate rates.**

This principle is so well recognized as a matter of law that it would need little more than passing reference were it not that the Master, in his find-

ings as to the value of the property and the ele- 1001
ments which go to make up the final figure used, recognizes a contrary principle and proceeds upon the theory that the original book entries, representing the property of the company at the time of the organization of the Consolidated Gas Company of New York in 1884, and particularly the amount for franchises, as binding upon him 1002
in this case and as the starting point from which to obtain the fair value of the property upon which a fair return is to be computed.

The Court below, adopted in a modified form the erroneous principle of the Master, particularly as to franchise value, and failure to deduct depreciation.

The Master finds (finding 63, p. 38a): 1003

"63. Exclusive of working capital, I find the fair value of the property used and needed in the manufacture, transmission and distribution of the quantity of gas required by the consumers of the complainant company, as of January 1, 1919, and since that 1004
date, and on which it is entitled to have a fair return computed, to be at least the sum of $71,054,351.14, arrived at as follows:

Property other than particularly specified	$38,675,393.99
Franchises	7,781,000.00
Astoria property	17,169,342.57
Astoria Tunnel	5,178,614.58
One-half the cost of the new 30,000,000 unit	2,250,000.00
Total	$71,054,351.14."

1005

1006 The Court below found:

"(h) *Recapitulation.* The "rate base" so figured without any allowance for franchises is as follows:

Land	$7,029,035
Plants	29,228,433
Conduits jointly used	4,400,000
1007 Office buildings	1,541,450
Present Astoria plant and land	15,497,615
New Astoria plant now building	4,500,000
Working capital	2,000,000
	$64,196,533."

1008

It will, therefore, be seen that the valuation of the Court below was as erroneous as the Master's, although the Court had disallowed certain pieces of property as not used and useful.

The first two figures, viz: "Land" and "Plants" in the Court's valuation, amount to
1009 $36,257,468, the Master's figures it will be seen were over two millions more than this.

If the franchise valuation is included in the Court's table above its rate base will be greater than the Master's. Both are erroneous, as we shall see. Franchises should have been excluded, there should be a deduction for office buildings, the new Astoria plant not yet used should be en-
1010 tirely excluded and the items for conduits jointly used, and the present Astoria plant are not proper.

We have argued elsewhere what the rate base should have been. We are here dealing only with the erroneous principles that have crept into the Master's and the Court's decisions.

The item of $7,781,000 for franchises in the 1011
Master's table is the precise amount at which the Consolidated Gas Company opened its books in 1884 for "franchise rights" (see findings 6 and 7, pp. 27a and 28a), and the Master says that he considers himself bound to accept this amount and to include it in the rate base for the fair value of the property (pp. 62a and 63a). 1012
The subject of franchises is discussed fully under another point.

The item of $38,675,393.14 representing "property other than particularly specified" is obtained apparently without change of a single figure from Respondent's Exhibit 496. This item will be discussed more fully under another 1013
point. Suffice it to say here, the figure in Respondent's Exhibit 496, which is adopted without change by the Master, is obtained by making certain adjustments in the figures shown upon the books of the company, but fundamentally it is based upon the opening entries of the books of the Consolidated Gas Company in 1884; in other 1014
words, the amounts at which the physical property of the Consolidated Gas Company were entered upon its books at the time of its organization are the basis for the final figures, without attempting, as will be seen, to determine the present value of the property which the respondent acquired in 1884 and still possesses.

The Master found (finding 9, p. 28a) that the 1015
authorized capitalization of the respondent company at the time of its organization was upon the basis of the actual market value of the shares of the constituent companies at that time. He also calls attention to the fact that these constituent

companies had been unrestricted as to the price charged for gas and had conducted their business without regulation by the State, adding that the stock of the various companies *therefore* became valuable property, and in the summer of 1884 the quoted value of the stock of these six companies in the aggregate was $39,078,000 (pp. 28a and 44a).

The Master also refers to the legislative investigation made through a Senate committee in 1885, and says that no effort has ever been made by the State in any proper proceeding to prove that the property transferred to the respondent company on consolidation was not worth the price agreed upon, and the public, through 36 years, has been led to believe by inactivity on the part of the State that the stock issued by the Consolidated Gas Company upon its organization was in compliance with law (pp. 45a-46a).

Apparently the Master is of the opinion that the property "values" used as the basis for consolidation in 1884 were sacred and should not be affected by any rate regulation unless and until the consolidation resulting in the formation of the respondent company had been attacked and the securities issued at that time overturned and the "values" fixed "by interested parties" had been upset. The suggested procedure is not only in direct conflict with the decisions of the Courts, but shows a misunderstanding of the nature of the police power to regulate rates, and of the fact that any Legislature was free at any moment to regulate rates notwithstanding the laws enacted by a preceding Legislature, and notwithstanding any action taken by the respondent

company itself. It is quite conceivable and prob- 1021
ably the law that the formation of the company could not be overturned because in any way illegal and that the securities once issued could not be recalled and cancelled, but that the power to regulate rates was still in full force and effect and could be used to limit and set aside any unfair and unreasonable rates. 1022

It is quite clear that the Master and the Court below gave great weight to what the Consolidated Gas Company did, under the Act of 1884, and considered themselves bound to recognize certain book entries made at that time as constituting rights which could not be properly affected by later legislation and which rights must be considered as property values protected by the 1023
United States Constitution in this action.

Both proceed to find that, as a result of the act of the Legislature of 1884, chapter 125 of the Laws of 1906, is illegal and void because in contravention of section 10 of Article 1 of the Constitution of the United States and the Fourteenth Amendment, because it does not allow a 1024
return as the court said of 6 per cent and as the Master said of 8 per cent upon the fair value of the property of respondent, such fair value of the property including items fixed " by the interested parties " at the time of the formation of respondent company (see finding 6, p. 27a).

We assert that the Master as well as the 1025
Court were in error in so doing and that what was done by the company in 1884 has no binding effect in determining the fair value of the property of the respondent company in the present action.

The regulation of rates is a sovereign power

1026 and has been repeatedly so held by the Courts, beginning with the historic decision of this Court in

Munn v. *Illinois*, 94 U. S. 113, 130.

See, also,

Smyth v. *Ames*, 169 U. S. 466, 522.
Minnesota Rate Cases, 230 U. S. 352.
1027 *People* v. *Budd*, 117 N. Y. 1.

This principle in no way conflicts with the power reserved to the Legislature to alter, amend or repeal charters of corporations.

Close v. *Glenwood Cemetery*, 107 U. S. 466, 476.
1028 *Greenwood* v. *Freight Company*, 105 U. S. 13.
Gibbs v. *Consolidated Gas Company*, 130 U. S. 396.
People ex rel. Cooper Union v. *Gass*, 190 N. Y. 323.

1029 The failure to exercise a sovereign power is not a bar to the exercise of that power by the Legislature at any time, and no vested rights are created by a failure to exercise a sovereign power whenever the State decides so to act. For example, it has been repeatedly held that the failure to enact laws relating to any such coming within the police power of the State does not prevent 1030 the Legislature from enacting ordinances relating to the health or well-being of its citizens at any time. Statutes limiting the use which may be made of private property requiring considerable expenditures in order that same may be made habitable, notwithstanding that such powers have not been exercised for many years, have been

held to be constitutional, and not in violation of 1031
the Federal Constitution as depriving the individual of his property without just compensation.

A statute permitting companies to incorporate and to issue securities does not create a vested right and does not establish any legal limitation upon the power of the State to regulate rates. Applied to the instant case, this principle means 1032
that the Statute of 1884 did not confer upon the Consolidated Gas Company or the security holders thereof, a right to an interest rate or a dividend rate thereon, and did not impose upon the Legislature the obligation to recognize any specific rate upon such securities, when it wishes to exercise its sovereign power to regulate gas rates. 1033

In other words, the Legislature was free in the exercise of its power to regulate gas rates after 1884 as it had been prior thereto.

The Fourteenth Amendment to the United States Constitution does not protect interest and dividend rates upon securities, but only the value of the property. 1034

Covington, etc., Turnpike Co. v. *Sanford*, 164 U. S., pp. 578–596.

As was said by Mr. Justice HARLAN, who delivered the opinion of this Court in that case:

> "It cannot be said that a corporation is entitled as of right and without reference to 1035
> the interest to the public to realize a given per cent upon its capital stock. * * * The public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends."

Smyth v. *Ames*, 169 U. S., pp. 466, 544, 547.

Whenever securities were issued by the Consolidated Gas Company, and whatever market value these securities may have had, either upon the basis of prospective earnings or upon the basis of the earnings of the constituent companies prior to 1884, the Legislature of the State of New York was free to regulate gas rates subject only to the limitations imposed by the Federal Constitution as to due process of law and as to a fair return upon the fair value of the property at the time the Legislature so acted, or at the time a proceeding was instituted before the Federal courts.

If this were not true, it is obvious that the power to regulate rates might be made of no force or effect provided a corporation at any time, no matter how remote from the date when the Legislature fixed rates, had issued securities, which at the moment of the action of the Legislature or a decision of the Federal Court, were greatly in excess of the value of the property. Further, if the principle is incorrect, the failure of the Legislature to act and to permit a company to go for a period unregulated and thereby earning an amount largely in excess of a fair rate of return and thereby creating market values of securities, the Legislature would be deprived of its power to regulate rates, unless the rates so fixed would not interfere with the excessive net earnings and the market value of the securities. Under such a construction of the law, public regulation would be of no value and a sovereign power of the Legislature would practically have been destroyed.

Hence, we contend that the Master and the

Court below committed a fundamental error in 1041
assuming that they were obliged to include in the
fair value of the property an item of $7,781,000
for franchises representing the book entry in
1884 and the several millions of dollars repre-
senting the company's "book cost" of physical
property, which it acquired in 1884, regardless of
its present condition and worth and regardless of 1042
the depreciation which accrued on that property
since its acquisition.

The decision of this court in the prior suit con-
tains no decisions or dictum in conflict with this
contention. The only comment in that decision
which might be so construed relates to franchises
and this is discussed under another point. 1043

POINT XI

The Master and the Court below erred in failing to follow the rules laid down by this Court that in determining the fair value of respondent's property depreciation should be deducted.

The Master makes no deduction for depreciation 1044
in determining the fair value of the prop-
erty. He even ignores the depreciation which
the company itself admitted for repairs and re-
newals which would be necessary to place the
property in as good condition as when new, ac-
cording to its claim. Thus the Master allowed
for the value of the property more than 1045
the company itself claimed and more than
should be allowed if the theory of the com-
pany that the property does not depreciate ex-
cept to the extent of the amount necessary "to
put it in as good condition as new" would re-
quire.

1046 It further appears by an examination of finding 63 that as the Master took the figures submitted by the company in respondent's Exhibit 496, without the change of a single figure, and as these figures themselves came from the books of the company and reflected the book cost of the property, the Master adopted as a matter of fact
1047 the book cost without any deduction for depreciation, except in the case of furniture and fixtures, cocks and connections, horses, wagons and harness, tools and implements, scows, gas appliances rented and automobiles and accessories in so far as these accounts were written down from time to time on an arbitrary basis. The total of
1048 these accounts was less than $3,000,000. Nothing has been deducted since 1914, and the amount of depreciation deducted by the company is unknown. On the large items, such as manufacturing plants and holder stations, street mains, services and meters and buildings included in real estate account, which would total between
1049 $28,000,000 and $30,000,000, no depreciation whatever was deducted.

In passing, attention may be called to the inconsistency of such a method. The company deducted depreciation upon such things as cocks and connections, but no depreciation upon meters for which the cocks and connections are pro-
1050 vided. Likewise, gas appliances that were rented were depreciated to some extent, but services were included at cost.

The Master, following figures submitted by the company, fell into the same error and inconsistency to which no reference is made in his findings or his opinion and for which no explanation

is given. He nowhere attempts to explain wh 1051
the same rule as to the depreciation of physical property that applies to automobiles, horses and wagons, furniture and fixtures and scows does not apply to meters, services, mains and plant equipment.

One is left to infer from his comments that the Master is of the opinion that if reproduction cost 1052
be taken as the basis for determining value, depreciation due to all causes must be deducted. Whether he is of this opinion or not, the decisions of this Court clearly are to that effect, and it may be that his desire not to conflict with the dicisions of a higher court already made led him to refrain from a finding as to depreciation upon 1053
the reproduction cost basis.

As already stated, the Master did not actually determine the *investment* in the property. What he took was the book cost thereof and assumed that the book cost was the investment. In other words, he virtually determined that depreciation should be deducted from reproduction cost, but 1054
should not be deducted from actual cost or from book cost, or from investment in determining the fair value of the property upon which the company is entitled to a return.

This directly contradicts common experience as well as the decisions of the United States Courts, for the depreciation of property is a fact, and 1055
its decline in value starts, as this Court has said from the very moment it is put into use and continues until it is finally withdrawn from service. Such depreciation is due to causes which have nothing to do with the cost of the property or book entries, or where the money comes from.

1056 Depreciation is a physical fact brought about largely by physical conditions, but also by changes in the art, changes in operating conditions and by the growth of cities. Whether the item cost $50,000 when new, or would cost now $100,000, or whether the money was provided out of earnings or invested by the bondholders is
1057 wholly immaterial; the property depreciates regardless of these factors. They may influence the amount of depreciation, it is true, but they do not have anything to do with the question of whether depreciation should be deducted in determining fair value.

Apparently, although there is no finding pre-
1058 cisely to this effect, the Master is of the opinion that book cost or investment, as he calls it, without any depreciation deducted is less than the reproduction cost of the property at present high prices less depreciation. In other words, he virtually says that the increase in prices of labor and materials during the war and since the war
1059 ended is at least equal to, and probably greater than the depreciation which would accrue upon the property if such unit prices were adopted.

Further, he misconstrues entirely the contentions of the appellants as to depreciation. He says that the appellants urged that the amount of investment should be "arbitrarily reduced
1060 merely because some of the plants or some of the property in them have been in existence for some years" (p. 67a). What the appellants contend really is, that a deducton should be made in determining fair value, not because the property has been in existence for some years, but because its value has decreased, due to causes that are

real, and that the amount of decrease is generally measured by the relation of the period for which each item or class of similar items have been in use to the total useful life of the property. In other words, as Mr. Maltbie said when on the witness stand, age is a measure of depreciation and not necessarily a cause. Upon the other hand, respondents contend, and apparently the Master so finds, that no matter how long a thing remains in use, its value is its cost or reproduction cost at present high prices up to the very moment that it passes out of use. In other words, in one moment, the instant when property is finally withdrawn from service, its value passes from 100 per cent. to zero, and in the case of the 14th Street and 42nd Street plants, the physical property now has a value equal to 100 per cent. We submit that the court needs merely to look at the photographs of this property in evidence (defendant's Exhibit AA278–293, p.18526) to realize how absurd is such a contention. 1061 1062 1063

In this connection, reference should be made to what was repeatedly brought out in the record, namely, that property ceased to be used and in many cases actually ceased to exist without being taken off of the books of the company, and in one instance it will be recalled Mr. Carter stated it took the company some 34 years to determine whether a purifier foundation, which had never been used but which had been placed in capital account and in the book cost of the property, had or would have any usefulness. 1064 1065

The absurdity of the Master's finding, that a company is entitled to a return upon its "investment" without deducting anything for deprecia-

1066 tion, even the needed repairs and renewals, may be shown in another way. Assume that the stock and bondholders of a company did invest $10,000,000 in cash in physical property, does it follow that the security holders are entitled to a return upon $10,000,000 as long as the company operates, without regard to the condition of the
1067 property, the probable remaining useful life of this property or the amount required for the repairs and renewals which would be necessary to place it in what complainant contends would be 100 per cent. operating condition.

The rule of law is clearly established that a company is not entitled to a return upon the
1068 actual cost of the property or upon reproduction cost or upon any other measure of the cost of property when new.

The rule in the Federal courts and in the courts of New York State is the same—namely, that consideration must be given to the condition of the property and that deduction must be made from
1069 cost for the accrued depreciation.

The principal recent case upon this point in New York State is *People ex rel. Kings County Lighting Co.* v. *Willcox, et al.*, 156 App. Div., 66, modified in 210 New York, 479. This case is not only important from the standpoint of the rule laid down that accrued depreciation must be deducted, but because of the strenuousness with
1070 which it was contended that there should be no deduction for any depreciation and because of the fact that the decision, which the Kings County Lighting Company undertook to overturn, held positively that the straight line method should be followed in determining accrued depreciation, and

that depreciation due to every cause, including in- 1071
adequacy and obsolescence, as well as wear and
ear and other causes, should be deducted. This
s the very method used by Mr. Hine in Defend-
nts' Exhibits AA425, AA426 and AA466 (pp.
8763, 19125).

In that case, the Appellate Division upheld the
Commission ruling that accrued depreciation 1072
should be deducted from cost new in determining
fair value. The court said (pp. 610-612):

> "The Commission said 'cost of reproduc-
> tion *new* is not necessarily an indication of
> present value. Depreciation and deferred
> maintenance are important factors.' It held
> that the proper method to ascertain the value 1073
> of the tangible property was to take the
> amount obtained by subtracting from the
> cost of reproduction its accrued depreciation,
> and therefore from its estimate of repro-
> duction cost new, subtracted $415, 198 for
> depreciation.
>
> The relator contends that this method is
> fundamentally unsound; that said sum should 1074
> not be deducted, but that the true rule is
> that the company is entitled to earn a re-
> turn on the full 100 per cent. service value of
> its investment; that the fair value for rate-
> making purposes is equal to the total cost
> of reproduction less scrap value, without any
> deduction whatever for accrued depreciation; that, therefore, the Commission's total 1075
> valuation is in error to the extent of the dif-
> ference between said amount and Mr. Con-
> nette's total of scrap value $183,150, or mak-
> ing in round numbers an amount of $230,000,
> which would be added to the total valu-
> ation."

1076 The court did not agree with this proposition, but pointed out that there must be a deduction for accrued depreciation and that such an allowance had been made in various cases of this kind. The court approved the amount of accrued depreciation deducted by the Commission on the straight line basis and said that this was proper.

1077 To the same effect is the *Knoxville Water Co.* v. *Knoxville*, 212 U. S., 1. In that case Mr. Justice Moody delivered the opinion of this court. He says (p. 10):

> "The cost of reproduction is not always a fair measure of the present value of a plant which has been in use for many years. The
> 1078 items composing the plant depreciate in value from year to year in a varying degree * * * the mains, the service pipes, structures upon real estate, stand pipes, pumps, boilers, meters, tools and appliances of every kind begin to depreciate with more or less rapidity from the moment of their first use. It is not easy to fix at any given time the
> 1079 amount of depreciation of a plant whose component parts are of different ages with different expectations of life. But it is clear that some substantial allowance for depreciation ought to have been made in this case."

In the case of *Spring Valley Water Works* v.
1080 *City & County of San Francisco*, 192 Fed. Rep., 137, pp. 184, 186, Judge Farrington said:

> "Depreciation may be delayed, but it cannot be prevented. Ultimately every structure in complainant's plant will be worn out by use, wasted by action of the elements, broken by accident, abandoned in the de-

velopment of the system, or displaced by 1081
newer and more efficient contrivances. In view of this fact, it was held in the 1908 case that complainant was entitled to an annual allowance to cover such loss. The highest courts have repeatedly declared this fact cannot be ignored in determining the value of property in rate cases.

In *Knoxville Water Co. v. City of Knox-* 1082
ville, 212 U. S., 1, * * * and more recently in *Contra Costa Water Co. v. City of Oakland* (Cal.), 113 Pac., 668, the lower court found the present cost of reproducing the plant, but failed to take into account the fact that an old plant is worth less than a new one. In each, the result was a reversal.

It is impossible to measure accurately such 1083
loss until it has matured. When a machine is worn out, we know its original value is gone; but while the machine is in use the amount of deterioration is largely a matter of opinion. Here the difficulties of the problem are increased by the fact that a very large portion of the most valuable construction, such as pipes, masonry and concrete 1084
work, are concealed in the ground or under water. * * *

I find the annual depreciation of this plant to be 1 per cent. per annum for cast-iron pipe, 2 per cent. for wrought-iron pipe, 2.5 per cent. for pump engines, flumes and wooden structures, and 5 per cent. for boilers. Thus I have ascertained the annual depreciation to be $212,983. 1085

The total depreciation to be deducted from the reproduction cost of structure is $2,922,538. This I have ascertained by multiplying the annual depreciation of each structure for the number of years it has been in use, using original cost as the basis of calculation."

1086 Mr. Maltbie and Mr. Hine testified as to accrued depreciation or the amount that should be deducted in determining the fair value of the property due to the decrease of the useful life of such property. Mr. Maltbie testified as to the general principles according to which depreciation should be computed (pp. 13315, 13318, 13325,
1087 13344). Mr. Hine gave detailed testimony explaining fully the methods which he used (pp. 13302, 13309, 13352-13450). Both defined depreciation as the term is generally used and as used by them, to be decrease in worth or value due to all causes, such as wear and tear, decay, inadequacy and obsolescence.

1088 The method which Mr. Hine used to measure depreciation as thus defined was as follows: In the first place, the age of each item of property was determined, or, if the age could not be determined, the probable remaining life was estimated. Next, an estimate was made of the probable useful life in service of each class of property, and
1089 the annual allowance for depreciation was then computed on the straight line basis. Thus, if an item of property had an estimated life of ten years and was five years old, the annual depreciation would be taken as one-tenth of the normal reproduction cost and the accrued depreciation would be five times the annual depreciation, or
1090 fifty per centum of the normal reproduction cost, assuming there is no salvage value.

Respondent contends that Mr. Hine's method is theoretical and does not take into account actual conditions, and the Master seemed to labor under somewhat the same delusion. As a matter of fact, Mr. Hine's estimates of accrued deprecia-

tion were based upon actual conditions and in 1091
order to determine the probable useful life of each item of property he had studied the experience of the respondent, of all other gas companies within the city of New York and of many gas companies elsewhere. He testified that the property was maintained in fairly good operating condition and that his estimates are based upon 1092
the assumption that the practice will be continued.

We again call attention to the decision of the Appellate Division in *The People ex rel. Kings County Lighting Co.* v. *Willcox, et al.*, case (quoted above), particularly to the brief submitted by counsel in that case, and to the record itself. 1093

Mr. Maltbie, as a member of the Public Service Commission for the First District, wrote the opinion of the Commission in that case from which an appeal was taken to the Appellate Division. The method followed for determining accrued depreciation by the experts of the Public Service Commission when the case was before that body, 1094
and the method used by the Public Service Commission in its decision, were the same as that followed by Mr. Hine in this case — namely, the straight line method based upon the relation of age to probable total life.

The decision of the Commission was attacked by counsel for the Kings County Lighting Com- 1095
pany before the Appellate Division as to the reasonableness of the method and the correctness of the findings of fact. Counsel for other utility companies, including the respondent, submitted a long brief upon this subject, contending that no deduction should be made for depreciation beyond

1096 deferred maintenance. The decision of the Appellate Division was clean-cut and conclusive. The court repudiated the theories of counsel for the utility companies and sustained the decision of the Commission both upon points of law and of fact. It is significant that although an appeal was taken from the decision of the Appellate
1097 Division to the Court of Appeals upon certain of the conclusions of law reached by the Appellate Division, there was no appeal from the rulings as to depreciation and they stand as the law of the State of New York.

As Mr. Maltbie pointed out in his testimony, the value of a thing depends upon the amount of
1098 useful service which it will render. This decreases as time passes, and consequently its value must likewise decrease and is at 100 per cent. only at the moment it is put into use.

Mr. Justice Moody, in the case of *City of Knoxville* v. *Knoxville Water Co.*, 212 U. S., 1, 10, calls attention to this fact in the following language:

1099 "The items composing the plant depreciate in value from year to year in a varying degree. Some pieces of property, like real estate for instance, depreciate not at all, and sometimes, on the other hand, appreciate in value. But the reservoirs, the mains, the service pipes, structures upon real estate, standpipes, pumps, boilers, meters, tools and
1100 appliances of every kind begin to depreciate with more or less rapidity from the moment of their first use. It is not easy to fix at any given time the amount of depreciation of a plant whose component parts are of different ages with different expectations of life. But it is clear that some substantial allow-

ance for depreciation ought to have been made in this case. The officers of the company, *alio intuitu,* etimated what they called 'incomplete depreciation' of this plant (which we understand to be the depreciation of the surviving parts of it still in use) at $77,000, which is 14 per cent. of the master's appraisement of the tangible property. A witness called by the city placed the reproduction value of the tangible property at $363,000, and estimated the allowance that should be made for depreciation at $118,000, or 32 per cent. In the view we take of the case it is not necessary that we should undertake the difficult task of determining exactly how much the Master's valuation of the tangible property ought to have been diminished by the depreciation which that property had undergone. It is enough to say that there should have been a considerable diminution, sufficient at least to raise the net income found by the court above 6 per cent. upon the whole valuation thus diminished."

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The court in the decision of *Brooklyn Heights R. R. Co.* v. *State Board of Tax Commissioners,* 69 Misc., 646, at page 656 says:

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"As surely as humanity travels to the grave, the machinery and equipment of a public service corporation travel toward the scrap pile. The plant and structures depreciate in less degree but as certainly. This is ordinary depreciation.

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But another form of depreciation in the case of properties here being valued takes place. The machinery or equipment, while still capable of years of service, becomes inadequate to do the work demanded — not

1106 only by the corporation, but by the law itself. In the case particularly of electrical machinery the type becomes obsolete by reason of invention, and increasing public demands frequently require in aid of safe and adequate service that the obsolete appliance or equipment give way to the new. Property which in itself may be almost indestructible in the hands of a public service corporation
1107 may be required to be replaced by the requirements of the public which the corporation serves. These requirements for change of plant, structure and equipment and their replacement, can be and are made by the State itself. Some of these changes are capable of definite ascertainment. Others are not so readily ascertainable. Many of
1108 them, however, may be provided against for the future by setting apart from gross earnings a reasonable sum to create a reserve against the day when they shall come."

In the recent decision by ex-Justice Hughes as Referee in the *Brooklyn Borough Gas Company*
1109 v. *Public Service Commission*, 17 N. Y. State Department Reports, 81, the expert for the company testified as to observed depreciation and allowed a small amount comparable with the amount estimated by Mr. Miller in the present case. Mr. Justice Hughes was asked to limit the amount of depreciation deducted to observed de-
1110 preciation. This he refused to do, saying:

"As was said by the Court of Appeals in the case last cited (Kings County Lighting Company): 'The cost of reproduction less accrued depreciation rule seems to be the one generally employed in rate cases. But it is merely a rule of convenience and must be applied with reason. * * * The only

evidence apart from the plaintiff's books is the testimony of Mr. Shattuck, the plaintiff's expert, but this relates only to the depreciation he observed. He conceded that there was depreciation or deterioration of the property not covered by ordinary repairs and that he had not given consideration to it in his appraisal. In the absence of any counter-vailing evidence, the depreciation in the plant may fairly be taken at the amount shown in the books, and if the attacked rate permitted an adequate return after making such allowance, there would be no ground for asserting confiscation; and whether the rate is confiscatory is the question here."

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The attention of the Court is also called to the fact that the accrued depreciation allowed in that case was based originally upon the findings made by the Public Service Commission, Commissioner Maltbie writing the opinion, which in turn were based upon an appraisal made by Mr. Hine in a rate case. The record before the Public Service Commission shows that accrued depreciation was estimated by Mr. Hine by the same method followed by him here. Ex-Justice Hughes' opinion, when read in the light of these facts, is a decision strongly supporting the claim made by appellants and repudiating the claim made by respondent.

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The court below disallowed certain pieces of property as not used and useful — but failed to deduct anything for depreciation (p. 178a) yet he recognized it must be taken into account (p. 146a). In his discussion of the subject he says that where original cost is used, depreciation must be deducted (p. 147a).

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1116 He then says:

> "Depreciation Maltbie and Hine figure at $6,507,400 and the answer at once occurs, that it is from any point of view more than met by the increased costs of present reproduction" (p. 177a).

1117 And so he allows nothing for depreciation (p. 178a).

This was clearly error. There was no evidence of how much the plants and structures would cost at present reproduction cost. If such evidence had been offered it would have been error to base any conclusion upon it for the reasons pointed out by ex-Justice Hughes in the *Brooklyn*
1118 *Borough Gas Co.* v. *Public Service Commission*, 17 State Dept. Repts. 81.

> "But it is a difficult thing, after cost has been defrayed and the question is as to compensation to be allowed in excess of cost, to take as the basis for a compensatory return an asserted plant value, for above actual in-
> 1119 vestment, which is reached merely by expert estimates of a cost of reproduction under abnormal conditions. This would result in allowing a public service corporation to take advantage of a public calamity, by increasing its rates above what would be a liberal return not only on actual investment but upon a normal reproduction cost in the view
> 1120 that unless it could make an essential exorbitant demand upon the public it would be deprived of its property without due process of law. The enforcement of the constitutional guaranty does not require the application of any artificial formula."

Any valuation based upon abnormal years 1917 1121
to 1919 would be unjust and unfair to the consumers.

There was no evidence of the cost of reproducing the plants and structures as of any time.

The amount to be deducted for depreciation is a fact — so the court erred by saying he would offset increased cost of present reproduction, 1122
without any evidence of the amount, against a depreciation of $6,507,400.

Assuming that our interpretation of the law is correct, and that depreciation due to all causes should be deducted in determining the fair value of property, we call attention to the fact that there is no testimony except that of Mr. Hine as to the 1123
reasonableness of the amount of such depreciation, and appellants contend that the figures given in Exhibits AA-425, 426 and 466, should be taken as representing the proper amount of depreciation to be deducted. The rate base figures given in XII represent the value of the property after accrued depreciation has been deducted, and 1124
appellants contend that the findings of the Master and court below should be set aside and that the evidence given by witnesses for appellants should be taken as determining the fair value of the property.

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POINT XII

The fair value of respodent's property upon which it is entitled to a fair return does not exceed the following amounts for the respective years:

A. Founded upon cost.

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1906	$22,002,363
1907	22,478,676
1908	22,559,046
1909	22,216,611
1910	23,268,412
1911	24,723,204
1912	26,316,426
1913	26,696,982
1914	26,550,073

1128

1915	26,059,066
1916	26,248,690
1917	26,590,849
1918	27,178,375

B. Founded on Assessed Values of Land and Actual Cost of Other Tangible and Intangible Property.

1129

1906	$25,534,524
1907	26,394,287
1908	26,769,463
1909	26,529,778
1910	27,651,971
1911	29,553,788
1912	31,263,842

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1913	31,463,669
1914	30,702,074
1915	29,878,361
1916	30,013,271
1917	30,494,185
1918	31,180,966

The elements which the court should consider 1131
in determining the "fair value" for rate-making purposes are clearly set forth in the leading case of *Smyth* v. *Ames*, 169 U. S., 466. There the court said (546):

> "And in order to ascertain the value (fair value) the original cost of construction, the amount expended in permanent improve- 1132
> ments, the amount and market value of its stocks and bonds, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration and are to be given such weight as may be just 1133
> and right in each case."

In the *Minnesota Rate Cases*, 230 U. S. 352, p. 434, Mr. Justice HUGHES, speaking for this court, said:

> "The ascertainment of that value (fair value) is not controlled by artificial rules, 1134
> it is not a matter of formulas but there must be a reasonable judgment having a basis in a proper consideration of all relevant facts."

Again at p. 454:

> "It is clear that in ascertaining the present value we are not limited to the consider- 1135
> ation of the amount of the actual investment. If that has been reckless or improvident, losses may be sustained, which the community does not underwrite. As the company may not be protected in its actual investment, if the value of its property be plainly less, so the making of a just return

1136 for the use of the property involved the recognition of its fair value if it be more than its cost."

The New York Court of Appeals said, in *People ex rel. Kings County Lighting Co* v. *Willcox*, 210 N. Y. 479, 495:

1137 "The cost of reproduction less accrued depreciation rule seems to be the one generally employed in rate cases. But it is merely a rule of convenience and must be applied with reason. * * * It should not be so applied as to deprive the corporation of a fair return at all times on the reasonable, proper and necessary investment made by
1138 it to serve the public, and on the other hand it should not be so applied as to give the corporation a return on improvements made at public expense which in no way increase the cost to it of performing that service."

In *People ex rel. Iroquois National Gas Co.* v.
1139 *Public Service Commission*, 194 App. Div., 578, (New York) COCHRANE, J., states (p. 581):

"The problem of fixing rates is necessarily difficult; as pointed out different elements need to be considered. Original costs, permanent improvements, necessary operating expenses, depreciation for use, present economic conditions, as well as other pertinent matters including the opinions of
1140 competent witnesses as to present values, should all receive fair consideration in reaching a conclusion as to the reasonable value of the property involved."

It is therefore, well settled that "fair value" 1141
is found by the exercise of sound judgment based upon fairly accurate, definite and weighty consideration of all the necessary elements and pertinent matters bearing on the subject.

The elements and facts bearing upon this question before the Master and the court below, were stated by the Master as follows (p. 63a): 1142

"* * * the complainant did not undertake, for the purposes of this case, to prove the present reproduction cost of its property * * * Aside from * * * present value of land, the complainant contented itself on its direct case by showing the inventories and appraisals made of its properties in 1906 1143
for the prior suit, the unit prices applied then to the properties inventoried, and the extent to which the properties then inventoried are now in existence and use by the complainant. Proof was then offered showing that the present unit prices for such materials, labor and the like, are substantially higher than those used in 1906. On this 1144
basis, I was asked to find that the present reproduction cost of the property used in 1906 and still in use is at least as much as the sum at which it was appraised in 1906, and that property added since 1906 is now worth at least as much as it cost when erected and installed. Although I have no doubt that the present reproduction cost would be at least as much as the sum thus 1145
arrived at, for reasons elsewhere indicated, I feel on sounder and fairer ground in basing my conclusions upon the actual investment in the property, proof of which was offered in the first instance by the defendants and by the complainant in rebuttal."

1146 In other words, respondent offered on its direct case, as an element of fair value, an appraisal made in 1906, plus additions and minus withdrawals, but the special Master preferred to determine what he thought was the "actual investment" in the property by a method which led to incorrect results and which we will later dis-
1147 cuss. As stated by the special Master, respondent, upon its direct case, relied upon a valuation based upon appraisals made in the year 1905 by witnesses since deceased, viz: Mayer, Simpson and Preiss, and the schedules of additions and retirements since that time.

The exhibit showing the summaries of this
1148 valuation and the evidence were received over appellants' objection (p. 8772) and is Respondent's Exhibit 403 (p. 17007, of record) and shows the full detailed valuation:

Land	$9,571,800 00
Manufacturing plants and equipments	14,414,938 98
1149 Improvements other than plant	3,148,840 11
Mains	16,239,943 29
Services	2,044,047 72
Meters, etc.	6,614,473 41

The above excludes working capital and fran-
1150 chise value shown on the exhibit. The total of the items above is $52,034,043.51. On this exhibit respondent deducts for jointly used property the sum of $3,885,710.07, thus leaving $48,148,333.44.

The appellants called, as one of their witnesses upon the fair value of respondent's property

used and useful in making and distributing gas, 1151
Willard F. Hine. Mr. Hine, it appears, is a graduate of the University of Wisconsin, with degree of Bachelor of Science in Electrical Engineering. After his graduation from the University he was employed by the Laclede Gas Light Company of St. Louis four years after which he entered the Public Service Commission 1152
of the State of New York, for the First District, as chief engineer, where he remained for eight years. While he was with the gas company in St. Louis he was assistant superintendent of one of its plants and later was assistant to the chief engineer (pp. 10434-10435).

Mr. Hine has made many appraisals of public 1153
utilities. While with the Public Service Commission, First District, he had charge of all of its gas engineering work and the question of appraisals of the gas companies. After he left the department he appraised the property of the City Gas Company of Norfolk, Va., the Haverhill Gas Company of Haverhill, Mass., the Minne- 1154
apolis Gas Company of Minnesota, the Municipal Gas Company of the City of Albany and the Utica Gas Company of Utica, N. Y., and many others (pp. 10435-6).

Mr. Hine gave detailed testimony explaining fully the method he used in arriving at the fair value of respondent's property (p. 12490). With
his evidence he presented various tables. These 1155
tables show the investment year by year of respondent for the various accounts. He says:

> "Using the Yalden figures that are contained in Senate Document 47, for the starting point in 1884 and then the books of the

1156 company, and these tables, for the investment after that date" (p. 12490).

The summary of these tables is found in Exhibit AA424. This exhibit shows that adjusted book cost of the fixed capital for 1905 to 1918, inclusive, of respondent, with the exception of land and
1157 certain buildings (p. 18761).

The cost of the various items, as shown by this exhibit, in 1918 is shown as follows (p. 18761):

Improvements in real estate.	$209,376 61
General structures, etc.....	185,619 54
Plant	9,979,935 72
Street mains	10,796,696 96
1158 Services	1,272,241 74
Meters	3,719,442 12
Cocks and connections.....	359,322 12
Office furniture and fixtures.	532,437 54
Tools and implements.....	149,335 26
Automobiles and accessories.	137,412 82
General stable equipment....	5,774 80
Gas appliances rented.....	1,711,935 46
Scows	15,821 20
1159	
Total	$29,546,093 17

This cost is without depreciation which is shown by another table and which will be discussed later.

1160 Mr. Hine finally prepared a rate base founded on cost giving the figures for each year 1906 to 1918, inclusive, of the fair value of respondent's property used and useful in the gas business. This includes, of course, an allowance which he made for depreciation. This exhibit will be discussed farther on in more detail. His exhibit

1161

AA466 shows that the fair value of respondent's property in 1918 excluding general office building and the 57th street property, is $25,642,645.

The document which Mr. Hine used as a starting point for his figures of adjusted book cost was the so-called Yalden report already referred to (p. 12490, Defts. Ex. AA47, p. 9187).

1162

Mr. Yalden, was a public accountant and auditor employed by the special committee of the Senate that made the investigation resulting in the report made March 1, 1886, which we have already referred to and will discuss later on.

Mr. Yalden's report is dated December 31, 1885, and was delivered to the special committee of the

1163

Senate and is found printed in full in Senate Document of the Legislature of the State of New York for 1886, Vol. IV, and is Appendix "D" to the committee's report (p. 9187).

The record shows that if the Master had undertaken to determine the actual investment, as that term is properly defined, in the property which

1164

he finds has a total value of $74,854,351.41 (Findings 68, 69 and 70, p. 41a), he would have ascertained the actual investment according to the uncontradicted testimony of witness Weber, Chief Statistician of the Public Service Commission of the First District (pp. 11493-11496). Dr. Weber showed that the amount invested in the plant of respondent was $42,506,991.29. (Ex. AA297, p.

1165

18530). Dr. Weber based his figures largely upon admissions made by witness Carter, secretary of respondent, on examination (pp. 11480-11490), as to the investment of the security holders up to the year 1905, plus the facts taken from a letter from the respondent to the Public Service

1166 Commission, First District, for the additional issue of stocks and bonds, (pp. 11485, 18529, Ex. AA296).

The figures given by Dr. Weber (Ex. AA297, p. 18530) of $42,506,991.29, included investment in all property except the Astoria plant, whether or not the property is now used and useful, and
1167 consequently represents an investment in some property which was never used for making and distributing gas, or in the gas business. The figure given by Dr. Weber as actual investment also assumed the original issue of stock to the constituent companies.

As we shall show hereafter the actual invest-
1168 ment at the time of the consolidation in 1884, was not $39,078,000 for which stock was originally issued, but a total of not more than $18,613,632. This last sum is also undepreciated, so that the minimum deduction from Dr. Weber's figure of $42,506,991.29 on this account above is not less than $21,000,000. Therefore, the actual invest-
1169 ment was not more than $21,500,000 in the entire property, excluding the Astoria property, and if depreciation were deducted, and various pieces of property not used and useful in the gas business were eliminated, this figure would be further reduced.

Therefore, as we have stated, if the Master had concluded to report to the Court the investment
1170 value as the rate base, he would have found that such actual investment is represented by a sum not greater than $21,500,000.

Respondent on rebuttal offered in evidence Exhibit 496 (p. 17444). This exhibit is a summary of the cost of the company's prop-

erty claimed to be used in the gas business, as of 1171
December 31, 1918. The items of valuation are:

Real estate	$10,647,062 94	
Manufacturing plants and holder stations	13,119,754 76	
Street mains	11,027,266 24	
Services	1,272,241 74	
		$36,066,325 68
Meters	$3,719,442 12	
Cocks and connections	359,322 12	
Furniture and office fixtures	532,437 54	1172
Horses, wagons and harness	5,747 80	
Tools and implements	149,335 26	
Scows	15,821 20	
Gas appliances rented	1,711,935 46	
Automobile and accessories	137,412 82	
		6,631,454 32
Total		$42,696,780 00
Less portion of jointly used property		4,022,386 01
Total		$38,675,393 99 1173

These figures exclude working capital and franchise.

This exhibit was introduced by Mr. Carter, secretary of respondent. All figures taken by him for property acquired prior to consolidation in 1884, were taken from the opening entries in the 1174
books of the company. (Ex. 467, p. 17111.)

These in turn were taken from what is known as the Rowland Report.

Rowland's report was allowed in evidence over appellants' objection and exception and is found in Senate Document 47 and will be more fully discussed hereafter. 1175

Suffice it to say here that Mr. Rowland did not pretend to give the actual cost of the property, but his was an appraisal or an estimate of the then reproduction value of the property, while Mr. Yalden whose figures Mr. Hine used, determined the actual cost of the property.

1176 Taking up again the Master's findings in Finding "70" he says:

> "I find that $4.00 per thousand cubic feet of gas sold fairly represents the actual investment in property used in the manufacture, transmission and distribution of the gas sold by the complainant company, and such
1177 investment may, for the purposes of this case, be taken to be at least that sum" (p. 24).

From what source and by what process the Master reaches this conclusion is not stated anywhere in his findings or in his opinion.

There is no testimony in the record from any
1178 witness that the fair value of the respondent's property was $4.00 per thousand cubic feet of gas sold. The only basis of this finding is apparently a statement made by counsel for respondent, who was not under oath or upon the witness stand, and a reference made in its brief submitted to the Master to decisions of the Public Service
1179 Commission as to other companies, and no evidence whatever was produced to show that these companies were similar in any respect to the respondent company.

Appellants cannot conceive of a finding based upon less evidence or justified less by the record. In other words, the Master has found a value in
1180 the instant case upon findings made by the Public Service Commission in other cases without any evidence in this case as to whether the figures there used were applicable or inapplicable to the property of the respondent company.

As of January 1, 1919, "and since that date," the Master found (finding 63) the fair value of

the property on which the respondent company was entitled to have a fair return, exclusive of working capital, "to be at least the sum of $71,054,351.14," composed of the following items: 1181

Property other than particularly specified	$38,675,393 99
Franchises	7,781,000 00
Astoria property	17,169,342 57
Astoria Tunnel	5,178,614 58 1182
One-half the cost of the new 30,000,000 unit	2,250,000 00
Total	$71,054,351 14

Of these figures the only one directly comparable with the figures given above for the fair values contended for by the appellants is the first item of $38,675,393.99, which the appellants contended should be the sum of $27,178,375 for the year 1918. It should be noted the Master's figure of over $38,000,000 is for the end of 1918, whereas the appellants' figures for 1918 are the average for the year and not for the end of the year. Further, the appellants' figures include working capital, which the Master's figures do not include. However, allowing for these differences, it is obvious that the finding of the Master is from about $7,500,000 to $11,000,000 in excess of the figures contended for by the appellants; and if the Master's allowance for franchises and for one-half the cost of a new 30,000,000-foot unit be excluded, both of which items appellants contend should not be included in the rate base, the difference between the Master's findings and the contentions of appellants ranges from about 1183 1184 1185

1186 $17,500,000 to $21,000,000, depending upon whether the cost of *all* property is used as a basis or the assessed values of land be taken in the place of the cost of land.

How did the master reach his figure of over $38,000,000? There is nothing in his findings to indicate from what source or by what method he
1187 obtained this so-called "fair value."

Although the Master does not state the source of his figure of $38,675,393.99, an examination of exhibits and of the Master's opinion shows that it was taken in whole and in detail from Respondent's Exhibit 496, from which the conclusion is inevitable that the Master has accepted that ex-
1188 hibit in its entirety with the exception of working capital.

The first thing to be noted about this exhibit and the evidence relating thereto (see pp. 14597 to 14691) is that it does not purport to show the *investment* in the property, but instead the *cost* of the respondent's property up to December 31,
1189 1918.

The Master's finding that the figures given in Respondent's Exhibit 496 are accurate is wholly based upon inference, for Witness Carter, who presented this exhibit, did not testify that it represented investment, and the exhibit itself clearly states that the figures represent cost. Conse-
1190 quently, unless investment and cost are synonymous terms, the finding of the Master is not supported by any evidence. Whether these terms are synonymous will be discussed later.

In some of the supporting detail sheets for this exhibit, the term "book value," which is not necessarily value at all or even cost, and "book cost" and "actual cost," are used by Witness

Carter in explaining the various exhibits. No- 1191
where in these supporting sheets is it stated that the figures given represent investment.

As already stated, the Master has used as the "fair value" upon which the company is entitled to a fair return, the company's figures representing the "book cost" of the property, less such adjustments as the respondent has itself made 1192
for the purposes of this case. So far as these figures are based, as they are in large part, upon the book entries made in 1884 at the time of the organization of the respondent company, what has already been said about the sovereign power of the State to regulate rates and the lack of any vested right upon the part of the company to a 1193
return upon these book entries regardless of the present value of the respondent's property, applies here with full force and makes a nullity of the Master's findings that the book entries made in 1884 are sacred.

But there is a still further and more fundamental objection to the Master's findings as to 1194
fair value, for he apparently intended to find that the fair value of the property is the actual *investment* in the property, and he made a fundamental error in assuming or in finding that the figures submitted by the company in the Complainant's Exhibit 496, represented the investment in the property as indicated by the com- 1195
pany's own books. It has already been shown to what extent he erred and to what extent he misconstrued the testimony of the respondent's witnesses; but it should also be pointed out that in his endeavor to ascertain investment he disregarded several important factors and failed to

1196 show an understanding of what investment really is.

Thus, to say that the actual investment is the book cost or even the actual cost, is erroneous, because the two phrases mean entirely different things. Actual cost represents what the company actually paid for its property in money or in
1197 money equivalent. Book cost is the amount at which the property is entered upon the books of the company and may or may not be actual cost. Neither is concerned with the source from whence the funds came to pay for the property, whether from security holders, reserve funds, earnings or contributions by consumers. Investment,
1198 which is an entirely different term, represents the contribution in money or money equivalent contributed by security holders. It may have little to do with the cost of the property, for it does not include property built out of reserve funds or property donated by the public or consumers. Investment, in other words, is merely
1199 the money which the stock and bondholders have contributed to create the property. Book cost and actual cost ought to have a direct relation, but it is usually an accident if investment is equivalent either to book cost or to actual cost.

In the instant case the Master has assumed that actual investment is equivalent in some cases to
1200 book cost, in other cases to actual cost, and in still other cases to book cost less a deduction for depreciation.

So far as can be ascertained from an examination of the Master's findings and opinion, he made no attempt to determine the actual investment in the property used and useful for gas pur-

poses as that term is properly defined. Even 1201
assuming that his figure of $38,675,393.99 correctly represents the actual cost of the property (which appellants by no means concede), the Master should have considered in order to determine the real unimpaired investment represented by this property, the reserves which the company has accumulated out of earnings amounting 1202
to nearly $12,000,000 (see Defendants' Exhibit AA-243). Thus, by allowing the company return upon "investment" without any deduction for these reserves, the Master not only improperly computed investment, but violated the rule laid down by this Court that a company has no right to raise money to pay for depreciation in excess of the amount actually disbursed during the par- 1203
ticular year, and then to use that money to make extensions and to claim a return thereon in a confiscation case.

Railroad Commission of Louisiana v. *Cumberland Telephone, Telegraph Co.*, 212 U. S., 414, 423-426.

1204

In other words, he allowed the company a return upon the property created out of funds provided by stock and bondholders and also out of funds contributed by gas consumers, and proceeds to set aside the law as unconstitutional because it does not allow a return upon the book cost of the property, including such property as 1205
was built out of reserve funds.

The Master found that the appellants had failed to show the exact cost of the various properties to the constituent companies but failed to refer to the reasons why the exact

1206 cost could not be shown, namely, that the books of the constituent companies which were available at the time the previous case was being tried, have since disappeared and cannot now be found (pp. 4980-5009). Further, the Master refused to allow appellants to place in evidence investigations made when the books were in existence and
1207 which reports are the best available evidence of facts which the original books contained. Appellants contend that he erred in so doing, and that under the rules which he made the attempts to establish the actual cost of the property were worthy of acceptance and should not have been excluded from all consideration in the finding of fair value.

1208 For the convenience of the court, we print here in full rate base table, Exhibit AA466, and said table adjusted in accordance with the decision of the court below.

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1210

DEFENDANT'S EXHIBIT AA-466

TABLE 295 — RATE BASE FOUNDED ON COST, 1906-1918

	1906	1907	1908	1909	1910	1911	1912
1. Land	$1,984,389	$1,970,289	$1,958,783	$1,958,783	$2,093,884	$2,080,753	$2,072,632
2. Other fixed capital	18,567,801	18,953,188	19,045,039	19,168,056	19,929,248	21,141,470	22,405,358
3. Working capital	1,205,000	1,200,000	1,310,000	820,000	900,000	940,000	900,000
4. Construction capital	200,000	200,000	180,000	200,000	300,000	300,000	300,000
5. Engineering, administration, etc.*							
6. Organization †							
7. Interest and taxes †							
8. Franchises ‡							
9. Going value §							
10. Total	$21,957,190	$22,413,477	$22,493,822	$22,146,839	$23,193,132	$24,472,223	$25,677,990
11. General office property:							
a. land	$65,173	$65,199	$65,224	$65,224	$65,224	$65,224	$233,260
b. building ¶				4,548	10,056	195,753	404,176
12. West 57th street property:							
a. land							
b. building							

* Included in above figures.
† None found separate from above figures.
‡ Actual cost not obtainable — books of original companies not produced.
§ None claimed by complainant.
¶ The general office building in the years 1906, 1907 and 1908 is included in "other fixed capital" above; the amounts in the other years represents the net cost of additions and finally of the large new building, now in use. If the general office building is to be included in the rate base, the figures for the cost of land and building here given should be added to the total cost given above.

TABLE 205 — RATE BASE FOUNDED ON COST, 1906–1918 — *(Concluded)*

	1913	1914	1915	1916	1917	1918
1. Land	$1,944,232	$1,733,142	$1,696,779	$1,696,602	$1,671,866	$1,653,809
2. Other fixed capital	23,114,308	22,813,285	22,365,173	22,261,217	22,335,195	22,508,836
3. Working capital	910,000	900,000	830,000	870,000	1,020,000	1,300,000
4. Construction capital	200,000	180,000	180,000	180,000	180,000	180,000
5. Engineering, administration, etc.*						
6. Organization †						
7. Interest and taxes †						
8. Franchises ‡						
9. Going value §						
10. Total	$26,168,540	$25,626,427	$25,071,952	$25,007,819	$25,207,061	$25,642,645
11. General office property:						
a. land	$401,295	$401,295	$401,295	$401,295	$401,295	$401,295
b. building ¶	1,485,998	2,897,441	2,885,168	2,528,372	2,538,147	2,542,615
12. West 57th street property:						
a. land			66,904	401,453	401,484	401,490
b. building				19,111	159,260	287,508

* Included in above figures.
† None found separate from above figures.
‡ Actual cost not obtainable — books of original companies not produced.
§ None claimed by complainant.
¶ The general office building in the years 1906, 1907 and 1908 is included in " other fixed capital " above; the amounts in the other years represents the net cost of additions and finally of the large new building, now in use. If the general office building is to be included in the rate base, the figures for the cost of land and building here given should be added to the total cost given above.

THE PRECEDING RATE BASE IS SUBJECT TO THE FURTHER ADJUSTMENT FOUND BY THE COURT BELOW, VIZ.: 28 PER CENT OF THE WHOLE INVESTMENT IN THE GENERAL OFFICE PROPERTY. (p. 180A.) WHEN SO ADJUSTED, THE FIGURES AND APPELLANTS' RATE BASE FOUNDED ON COST WILL BE AS SET FORTH IN THE FOLLOWING TABLE:

RATE BASE FOUNDED ON COST AND ADJUSTED AS ABOVE STATED

	1906	1907	1908	1909	1910	1911	1912
Land (Ex. AA-466)	$1,954,343 03	$1,970,243 03	$1,958,783 03	$1,958,783 03	$2,063,884 00	$2,089,753 00	$2,072,632 00
Other fixed capital (Ex. AA-466)	18,567,831 03	18,953,188 03	19,045,033 03	19,168,033 03	19,923,218 03	21,141,470 00	22,405,358 00
Working capital (Ex. AA-466)	1,235,033 03	1,290,033 03	1,310,033 03	823,033 03	993,033 00	940,000 00	900,000 00
Construction capital (Ex. AA-466)	200,000 00	*233,033 00	189,033 03	203,033 03	330,000 00	300,000 00	300,000 00
Engineering, administration, etc. (Ex. AA-466) *							
Organization (Ex. AA-466) †							
Interest and taxes (Ex. AA-466) †							
Franchises (Ex. AA-466) ‡							
Total	$21,937,190 00	$22,413,477 00	$22,493,822 00	$22,146,839 00	$23,193,132 00	$24,462,223 00	$25,677,990 00
General office property (Ex. AA-466)	65,173 00	65,199 00	65,224 00	69,772 00	75,280 00	260,977 00	637,436 00
West 57th street property (Ex. AA-466)							
Total	$22,002,363 00	$22,478,676 00	$22,559,046 00	$22,216,611 00	$23,268,412 00	$24,723,200 00	$26,315,426 00

* Included in above figures.
† None found, separate from above figures.
‡ Actual cost not obtainable, books of original companies not produced.

1216 1217 1218 1219 1220

THE PRECEDING RATE BASE IS SUBJECT TO THE FURTHER ADJUSTMENT FOUND BY THE COURT BELOW, VIZ.: 28 PER CENT OF THE WHOLE INVESTMENT IN THE GENERAL OFFICE PROPERTY. (p. 180A.) WHEN SO ADJUSTED, THE FIGURES AND APPELLANTS' RATE BASE FOUNDED ON COST WILL BE AS SET FORTH IN THE FOLLOWING TABLE:

RATE BASE FOUNDED ON COST AND ADJUSTED AS ABOVE STATED

	1913	1914	1915	1916	1917	1918
Land (Ex. AA-466)	$1,944,232 00	$1,773,142 00	$1,696,779 00	$1,696,602 00	$1,671,866 00	$1,653,809 00
Other fixed capital (Ex. AA-466)	23,114,308 00	22,813,285 00	22,365,173 00	22,261,217 00	22,335,195 00	22,508,836 00
Working capital (Ex. AA-466)	910,000 00	880,000 00	830,000 00	870,000 00	1,020,000 00	1,300,000 00
Construction capital (Ex. AA-466)	200,000 00	180,000 00	180,000 00	180,000 00	180,000 00	180,000 00
Engineering, administration, etc. (Ex. AA-466) *						
Organization (Ex. AA-466) †						
Interest and Taxes (Ex. AA-466) †						
Franchises (Ex. AA-466) ‡						
	$26,168,540 00	$25,646,427 00	$25,071,952 00	$25,007,819 00	$25,207,061 00	$25,642,645 00
	438,442 04	923,646 08	987,213 76	820,306 76	823,043 76	846,732 20
General office property (Ex. AA-466)			99,899 88	420,563 00	560,744 00	688,998 00
West 57th street property (Ex. AA-466)						
Total	$26,606,982 04	$26,570,073 08	$26,059,065 64	$26,248,689 76	$26,590,848 76	$27,178,375 20

* Included in above figures.
† None found separate from above figures.
‡ Actual cost not obtainable, books of original companies not produced.

250

In order to clearly understand the basis for 1231
the appraisal submitted by respondent and the
method adopted by the special Master in deter-
mining what he called "actual investment," the
court must read with care the report of the special
committee of the State Legislature appointed to
investigate the capitalization of the Consolidated
Company. (Senate Document 47, Respt. Ex. 398, 1232
Applts.' Ex. AA 46, p. 17706).

The appellants strenuously contend that this report clearly shows the grievous errors committed by the special Master and the learned court below.

The history of the matter is as follows:

This respondent was organized in the year 1233
1884 by the consolidation of six of the seven gas
companies doing business in the city of New York.
The gas companies merged were:

New York Gas Light Company, incorporated in 1823.
Manhattan Gas Light Company, incorporated in 1830.
Metropolitan Gas Light Company, incor- 1234
porated in 1855.
Harlem Gas Light Company, incorporated in 1855.
Municipal Gas Light Company, incorporated in 1874.
Knickerbocker Gas Light Company, incorporated in 1876.

1235

These companies claim to be possessed of certain rights to use streets of the city for the purpose of laying mains and service pipes in order to furnish gas to the city and its citizens. The companies had been free from legislative regula-

1236 tions as to the price of gas and had been most prosperous and had divided very large earnings in the shape of enormous dividends to their stockholders.

As was said by Mr. Justice Peckham in the prior suit:

> "The evidence shows that from their
1237 creation, down to the consolidation in 1884, these companies had been free from legislative regulation upon the amount of the rates to be charged for gas. They had been most prosperous and had divided very large earnings in the shape of dividends to their stockholders, dividends which are characterized by the Senate committee, appointed in
1238 1885, to investigate the facts surrounding the consolidation, as enormous. The report of that committee shows that several of the companies had averaged, from their creation dividends over sixteen per cent, and the six companies in the year 1884 paid a dividend upon capital which had been increased by earnings, as in the case of the Manhattan
1239 and the New York, of eighteen per cent, and, had it been upon the money actually paid in, it would have been nearly twenty-five per cent."

Willcox v. *Consolidated Gas Co.*, 212 U. S., 19, p. 45.

1240 The Special Master states:

> "The stock of the various companies, therefore, became valuable property and of the summer of 1884 the quoted value of the stock of these six companies, in the aggregate, was $39,078,000" (p. 44a).

The various companies, as above stated, were consolidated pursuant to chapter 367 of the Laws of 1884. Concerning this Act the Special Master states: 1241

> "The probability is that chapter 367 of the laws of 1884 came into existence because of the scheme to consolidate the various gas companies" (p. 44a). 1212

The Act of 1884 authorizes corporations engaged in manufacturing to consolidate by a method radically different from the then existing law. Under the prior law companies could consolidate, but the capital stock of the new company could not be charged any more than the aggregate amount of the capital of the consolidated companies. 1243

Under the Act of 1884 the capital stock of the consolidated company could not be "larger in amount than the fair aggregate value of the property, franchises and rights of the several companies thus to be consolidated." 1244

The Act provided that the determination of the fair aggregate value was to be made by the directors of the various companies and approved by the stockholders of each constituent company. The directors thereupon appointed a committee for the purpose of appraising the various plants and agreeing upon their value, and this committee, in turn, employed Thomas F. Rowland, an engineer, to assist in the appraisal. The value 1245

agreed upon by the parties interested was as follows:

Real estate	$10,332,000
Plant	12,175,000
Mains	5,217,000
Services	1,500,000
Meters	1,195,000
Office furniture and fixtures	70,000
Total tangibles	$29,994,000
Franchise and rights	7,781,000
Total	$37,775,000

The capital stock of the Consolidated Gas Company authorized was $39,078,000; the remainder, viz: $1,303,000 being held in the treasury of the company to provide working capital. It is plain, as the Senate committee found, that each company, anxious for the consolidation, and no one to interfere with any existing valuations, tried to make its own figures as high as possible and still maintain the proportion that the value of each plant bore to the whole property. The agreed valuation did not represent the original cost of the property, the actual investment by the stockholders and bondholders, nor the cost of reproducing the property, but the valuation comparable with the quoted market value of the shares of the constituent companies at that time. This agreed valuation made between the interested parties became the opening entries in the books of the Consolidated Gas Company, and is referred to at times as "Book Cost."

This agreed valuation taken from the Rowland

appraisal was set forth verbatim in the opening journal of respondent in 1884, and it has become 1251
the basis for all the figures on values submitted by respondent. It was the basis of Witness Carter's Ex. 496, which exhibit was adopted by the Master.

It is clear, therefore, that by using the Rowland agreed valuation and the opening entries of the journal of respondent there is an enormous infla- 125?
tion of value, or a fictitious value to the extent of about $21,000,000 over and above the actual investment in the property taken over at the time of the consolidation. (Ex. 461, p. 17111.)

On May 15, 1885, the Legislature appointed a special committee to investigate facts relative to the capitalization of the Consolidated Company. 12?3
The appointment of this special committee by the Legislature is significant for the Legislature seldom conducts an investigation unless it is apparent it is for remedial measures or to avert an impending scandal.

The report of this legislative investigating committee should be carefully read by the court for 1254
it sheds considerable light upon the facts surrounding consolidation (Senate Document 47, Complt's. Ex. 398, and Defts' Ex. AA46, AA47, AA48, pp. 17706, 17769 and 17939).

Chairman John I. Gilbert, of the committee, as a result of a deep study of the affairs of the various companies, submitted a comprehensive 1255
and detailed report of the whole matter and its many phases. It seems that this committee had the assistance of J. Yalden, public accountant and auditor, who made a thorough examination of the books of the various constituent companies and

1256 rendered a report to the committee (See Senate Document, p. 47, Defts'. Ex. AA47).

This committee found, among other things, the actual capital contributed by the stockholders of those six companies, amounted to the sum of $8,727,050. (Senate Document 47, p. xxviii.) It also found that there had been paid to capital
1257 from surplus and profits the sum of $4,284,700 (Senate Document 47, p. xxix) and that there was issued for property, shares representing the value of the sum of $2,488,250. The sums above mentioned, aggregating $15,500,000 "comprehend the actual capital of all constituent companies at the time of the consolidation." And the
1258 committee further found

> "The total cost from all surplus of property paid for by stockholders, originally contributed, by surplus earnings, by stock treated as money, and from the proceeds of bonds and other loan., was as follows:

1259

Company.	*Total cost of property.*
Manhattan	$4,630,642 49
New York	4,630,642 03
Metropolitan	5,292,175 35
Municipal	4,092,347 86
Knickerbocker	810,481 15
Harlem	1,243,986 97
Total	$20,942,632 85 "

1260

It was found that the outstanding indebtedness of the same companies was then $2,329,000; this sum, therefore, should be deducted from $20,942,632.85. As the property nominally costing the last mentioned sum, was subject to those tests, the conclusion, therefore, follows that from the

books of the constituent companies, their actual investment was not greater than $18,613,632. This sum should be further diminished by the proper amount to represent the actual cost of mains, apparatus, wear and tear, and destroyed or impaired property. (Senate Document 47, p. xxx; Complt's Ex. 398, p. 8347; Defts'. Ex. AA46, p. 9180.) 1261

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The committee further states:

> "The books of the companies show that the entire cost of the property, including patent rights, was between twenty and twenty-one million dollars, for which the companies were still owing upwards of two million dollars." (Senate Document 47, p. xviii.) 1263

And again,

> "Another mode of arriving at the fair value is by ascertaining what it would cost at the time of consolidation to duplicate the property. It may safely be inferred from all the evidence that about $15,000,000 would be ample for that purpose." (Senate Document 47, p. xviii.) 1264

Upon consolidation, the capital of the constituent companies was proportioned as follows:

Company	*Old share*	*New share*
New York	$4,000,000	$7,560,000
Manhattan	4,000,000	11,940,000
Metropolitan ..	2,500,000	7,175,000
Municipal	3,000,000	5,100,000
Knickerbocker..	1,500,000	3,000,000
Harlem	2,000,000	3,000,000
Total	$17,500,000	$37,775,000

1265

(Senate Document 47, p. xxxiii.)

1266 The above valuation was based, not upon the original cost of the property, the actual investment by the stockholders and bondholders, nor the cost of reproducing the property, but upon the *aggregate value of the shares of their capital stock*, which market value was in all cases largely inflated by enormous profits which the company
1267 had earned in the past and free from regulation to continue so to do in the future. The interested parties, however, proceeded to value the tangible property to be merged in the sum of $29,994,000, as was said by the Senate committee:

> "The entire properties, when valued or pretended to be valued in this way, are sched-
1268 uled by the managers at $29,994,000.
>
> This scheduled estimation of $29,994,000, therefore, necessarily comprehended an overvaluation of all there was or could have been of properties, franchises and rights belonging to all the constituent companies.
>
> The arbitrary addition, therefore, to this sum of more than twenty-five per cent. of
1269 this excessive valuation not only savors of fraud to some innocent stockholders, who approved it, but same amounted to a public wrong. Instead of $29,994,000 the consolidation capital appears scheduled at $39,078,000. This result is attained not only by excessive estimations according to the scheduled items but by their actual duplication."
1270 (Opinion of Gilbert, Senate Document.)

The two other members of the committee, Messrs. Robinson and Murphy, submitted a separate report stating:

> "To the above recommendations *your committee are unanimous* and to *many* of the

conclusions in the report, but to that part 1271
of the report which finds that the Consolidated Gas Company violated any of the provisions of chapter 367 of the laws of 1884 and to all conclusions which follow from such finding, the majority of your committee dissent and submit the following as their report upon that question. * * * The
question for your committee to examine was 1272
this capitalization thus obtained more than a fair aggregate value of the properties, franchises and rights of the constituent companies at the time of the consolidation. The street mains, valves, meters, services, plant, building furniture, office furniture and lavatories appear to have been appraised at the value of what it would cost to reproduce 1273
them at the time of the consolidation, and there is no evidence that any of these items were appraised too high, except the evidence of the expert Mr. Yalden who found that they were valued higher than they appear to have been charged as costing in the company's books." (Senate Document 47, p. lxxvi.)

1274

Again:

"Your committee, therefore, is *compelled* to report that they found nothing in the organization which is contrary to the law under which it was effected, *unless there should have been an overvaluation of property, and as to that the difficulties attending the determination of such a fact are so great* 1275
that your committee believed that any attempt to upset such violation would be futile."

It would seem, therefore, that Messrs. Robinson and Murphy of the Senate Committee could

find no illegality in the organization perfected pursuant to statute passed for that special purpose, and also reached the conclusion that the determination of the actual value of the property merged was attended with such difficulties that it would be futile to attempt to attack the validity of the consolidation. Of course, the validity of the consolidation is not attacked in any way in this proceeding. But we do contend that any valuation determined at the time of the consolidation by the parties interested is immaterial in this case, and not binding in any way in the present proceeding, though the special Master and the court below seem to adopt the principle that respondent had a "vested interest" in the valuations reached at the time of the consolidation and which were adopted as open book entries by the consolidating company.

As above stated, the Senate Committee employed Mr. Yalden, an accountant, to aid it in its investigation of the companies which comprise the Consolidated Gas Company. Mr. Yalden rendered a report (Appendix "D," p. 635, Senate Document 1886, Vol. IV, Applts'. Ex. AA47) in which he set forth a complete report of the constituent companies, and showing, among other things, the capital used in the business of the various companies; the investments on account of real estate, mains, meters, services, etc., and the particulars of sale to the Consolidated Gas Company.

The summary of the accounts of the constituent companies of the Consolidated Gas Company show on page 775 of the Senate report aforesaid, that the actual cash paid in was $8,727,050.

1281

and that the profit in stocks on consolidation or the difference in par value of the stock of the old companies and the stock of the new Consolidated company was $19,970,000. On page 776 of the Senate Document the cost of the property of the constituent companies was given as $20,042,632.85.

1282

This report rendered by the unbiased public accountant employed by the Senate Committee is the basis for the appellants' schedules and proof showing actual cost of respondent's property. In other words, the respondent's proof of value rests upon the reports of Engineer Rowland, who attempted to make a reproduction valuation in 1884, at the time of the consolidation while appellants' proof regarding value has, as its basis, the unbiased report of Public Accountant Yalden giving complete details taken from the books of the constituent companies. The Yalden report furnished the Senate Committee with the facts recited at great length in the report of Chairman Gilbert.

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When the report of the special Master came before the lower court for review, the learned court seems to have based determination of the rate base upon "present reproduction cost," for he states, after commenting upon this theory:

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"The rule of the present reproduction cost which is a necessary consequence of the foregoing argument, appears to me to have been either expressly or implicitly recognized in all the cases in which the supreme court has passed on these matters" (p. 145a).

1286 He seems to have chosen the present reproduction theory as a basis for the rate base and excluded the other necessary elements as pointed out in the case of *Smyth* v. *Ames, supra* for he was of the opinion

> " With deference, it appears to me to be merely an abandonment of any attempt to
1287 deal intelligently with the question to say that cost of reproduction *and* the original cost are each elements to be considered" (p. 143a).

He declined to allow any deduction for depreciation in the plant, holding to the view that

1288 > " If in fact the capacity has remained the same, depreciation should not be a function of the ' rate base ' at all " (p. 147a).

He expresses his final conclusion upon this question by the following words:

> " Depreciation, Matlbie and Hine figure,
1289 at $6,507,400, and the answer at once occurs, that it is from any point of view more than met by the increased cost of present reproduction " (p. 147a).

This method of balancing depreciation and appreciation has, of course, been specifically and definitely disapproved by this court.

1290 *Minnesota Rate Cases*, 230 U. S. 352.

The learned Judge adopted for the " rate base," what he himself defined as " reproduction value of plants estimated from their cost,"

evidently taken from the books of the company, 1291
and probably more correctly termed "book cost."
Adopting this figure from the books he says:

> "Besides, there is a check, curiously conclusive, at least to me, upon the cost of the plants. As I have said, the Astoria plant of thirty million foot water-gas now building will cost $4,500,000, to be completed by De- 1292
> cember of this year. The contract was let in December, 1919, and forms a good test of what the costs then were for such units, better probably, than the opinions of witnesses. It is a fair inference from that contract that the cost in such large units was not less than one and a half millions per ten million feet capacity, and so Addicks takes it. The 1293
> capacity of the only two water-gas units on Manhattan is thirty-four million, making at such rates a cost of $5,100,000. The book cost is a little short of five million dollars, a surprisingly close parallel. Therefore, judged upon the basis of their present capacity, I may assume that the reproduction value of the Manhattan plants is at 1294
> lease their book value" (pp. 177a, 178a).

Reproduction cost as of the present time or the time since the World War has been condemned as a basis for valuing utilities.

This question was presented to ex-Justice Hughes in the case of *Brooklyn Borough Gas Co. v. Public Service Commission*, 17 St. Dept. Rep. 1295
81, at a time when prices had not reached the extreme level of today, and he repudiated it in the following words:

> "While it is important to consider the cost of reproduction in determining the fair value of the plant for rate-making purposes,

1296 it cannot be said that th re is a constitutional right to have the rates of a public service corporation based upon the estimated cost of the reproduction of its property at a particular time, regardless of circumstances. To base rates upon a plant valuation simply representing a hypothetical cost of reproduction at a time of abnormal
1297 high prices due to exceptional conditions would be manifestly unfair to the public and likewise to base rates upon an estimated cost of reproduction for lower than the actual bona fide and prudent investment because of the abnormally low prices would be unfair to the company. This question of taking the hypothetical reproduction cost under abnor-
1298 mal conditions as a rate base should of course, not be confused with the necessity or recognizing actual costs of operation even though abnormal. A public service corporation is entitled to be reasonably compensated for its service and the actual cost of its operations must always be taken into consideration in determining whether or not
1299 it receives a fair compensation above that cost. But it is a different thing, after cost has been defrayed and the question is as to the compensation to be allowed in excess of cost, to take as the basis for a compensatory return an asserted plant value, far above the actual investment, which is reached merely by expert estimates of a cost of reproduc-
1300 tion under abnormal conditions. This would result in allowing a public service corporation to take advantage of a public calamity by increasing its rates above what would be a liberal return not only on actual investment, but upon a normal reproduction cost in the view that unless it could make an essentially exorbitant demand upon the pub-

lic it would be deprived of its property without due process of law. The enforcement of the constitutional guaranty does not require the application of any artificial formula." 1301

Mr. Ransom, trial counsel for respondent here, was formerly counsel to the defendant Public Service Commission. In his brief for the Commission in the *Brooklyn Borough* v. *Woodbury* (*supra*) he said: 1302

"That reproduction cost must be accepted as the controlling factor in ascertaining fair value has never been established" (p. 21).

The rate base as found by the court below was as follows: 1303

Land	$7,029,035
Plants	29,228,433
Conduits jointly used	4,400,000
Office buildings	1,541,450
Present Astoria plant and land	15,497,615
New Astoria plant now building	4,500,000
Working capital	2,000,000 1304

These figures, as we have before recited are so-called "book cost" of the respondent company.

The court, in endeavoring to determine the reasonableness of the rate base, attempted to check this figure with the Astoria Light Heat & Power Company's plant which it was contemplated to build at that time. 1305

The testimony regarding this plant was given

1306 by Mr. Addicks, vice president of the company, as follows:

"Q. As a matter of fact have you, in view of the situation been for some months engaged in steps for additional plant capacity for the requirements of complainant company?

1307 Mr. Chambers: I object to that as not proper rebuttal, and out of the time limit.

The Master: No, for some months. Objection overruled.

Mr. O'Brien: Well, you are opening up the draperies again.

The Master: Objection overruled.

1308 Mr. O'Brien: Exception.

Mr. Chambers: Exception.

A. We have been considering —

Mr. O'Brien: Your Honor is considering this as some time prior to August 31, 1919?

1309 The Master: We are taking this as bearing on the testimony of Mr. Hine.

A. We have been considering and have taken steps to increase our capacity.

Q. Ground was broken some time ago for a new plant? A. Yes, sir.

Q. How large a plant. A. 30,000,000 cubic feet.

1310 Mr. O'Brien: Isn't that ground already broken?

The Master: He said it was broken some time before.

Mr. O'Brien: Wasn't it broken some time before?

The Master: You will have your cross-examination. 1311

Q. At what cost?

Mr. Chambers: I object to that as incompetent, irrelevant and immaterial, and not proper rebuttal.

The Master: I will take it.

Mr. Chambers: Exception. 1312

A. At an estimated cost, as I recall it, of $4,500,000.

The Master: That is water or coal.

The Witness: Water.

The Master: Does that include land cost?

The Witness: No, sir. 1313

The Master: I take it, you intend to put it over at Astoria.

The Witness: Yes, sir. Nor does it include a great deal of coal handling facilities, wharves, etc " (pp. 42987–42988).

It will be seen, therefore, that the learned court 1314 attempts to take these figures from the hearsay evidence given by an officer of the company and attempts to use this figure of present reproduction cost as a check on the book figure adopted by him. We submit that this evidence is too unreliable and too indefinite upon which to base the valuation of a plant in such an important case as 1315 the instant case.

As we have shown elsewhere in the brief, the construction of this Astoria plant had not even been begun and if it were constructed within the period contemplated it would be at an enormous inflated cost at that time.

1316 Mr. Little gave the following figures of investment per thousand cubic feet of annual sales for a complete water gas plant and a complete coal gas plant produced in 1914 (pp. 12307-12310).

	Water gas	*Coal gas*
Equipment	$ .62	$ .90
Buildings	.13	.26
1317 Land	.26	.26
Distribution	1.50	1.50
Working capital and sundries	.29	.29
	$2.80	$3.21

1318 The learned court seems impressed with the fact that witness Little swore that in 1914 it was the concensus of opinion of the engineers that a water-gas plant would cost $2.80 and that the present cost would be double that amount, or $5.60.

1319 While on the witness stand the Master cross-examined witness Little on all sorts of questions in order to obtain from him an expression of opinion which he might use later in his opinion and report.

1320 We call the court's attention particularly to the efforts of the Master to drag from witness Little testimony regarding the amount of investment necessary in a plant (p. 12304). Although he had not qualified himself in regard to investment and gave no direct testimony on that subject.

Mr. Little, in answer to the Master's questions, stated that from figures in a case that he had worked on in Chicago, the investment would work out about $2.80 per M cubic feet of gas sold per

annum, including land, building equipment, distribution systems and working capital; basing his opinion entirely upon his figures in the big Chicago case. He informed the Master that the investment in the year 1914 was represented by about $2.80 per M cubic feet. This figure of $2.80 witness Little stated represented the reproduction new valuation which was not depreciated (p. 12307).

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Witness Little further expressed the opinion in answer to the Master's questions that such investment in 1917 would be about 90% more than his 1914 figures, or $5.32 per M cubic feet. The appellants contend that no such figure can be applied in any given case, and particularly in this case, and that witness Little was simply giving the results of a case in Chicago which probably is not comparable with the instant case. Nevertheless, had the learned court adopted a normal pre-war reproduction valuation, which we contend would be fairer than present reproduction, and adopting as the court did the figures given by witness Little, in the Chicago case, the valuation most certainly should not have exceeded $2.80 per M cubic feet for water gas and $3.21 for coal gas. The court has calculated the rate base on sale of 19,000,000 feet (p. 181a) and finds that the ratio of coal to water gas is 22 to 78.

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The rate base as found by the court below is therefore unquestionably based upon the inflated and excessive prices of the unusual year of 1919.

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POINT XIII

An allowance for working capital, so far as respondent company is concerned, should not exceed $1,300,000.

The special Master, in his report, found that the company was entitled to $3,800,000 for working
1327 capital (p. 70a) while Judge Hand took the figure figure of $2,000,000 (p. 181a).

The amount of working capital to be allowed in each case must depend upon the conditions under which the companies purchase their supplies and collect bills. If a company purchases oil and coal, for example, on sixty days credit,
1328 the money need not be paid before a large part of all of the bills for gas supplied, during at least part of the sixty days, has been collected; on the other hand if a company were obliged to pay cash for supplies, and if wages were paid in advance, a company would need working capital to pay operating expenses for a month or two; that is,
1329 until it were able to collect the amount advanced for such purposes from consumers through the payment of gas bills.

In the prior suit the allowance made by Judge Hough for working capital was $1,616,000. What Judge Hough said in the prior suit is apt here:

1330 "Complainant's credit is of the highest * * * To assert that a concern with such credit as complainant, with small percentage of loss, and a plant completed and paid for, needs as working capital not only the amount of its average outstandings payable and $1,000,000 in cash, but enough more to make its average bills receivable equal to cash, is

going too far. A fair working capital for complainant is $1,616,000, and that figure is adopted" (157 Federal Rep., 849, p. 859). 1331

The Master has found that respondent is entitled to $3,800,000 for working capital and he states that he has based his opinion on the testimony of A. S. B. Little, a witness called on behalf of the defendants. He says in his opinion (p. 70a): 1332

"For the purpose of determining the amount of working capital I have accepted Mr. Little's figure, which makes the working capital on the basis of 19,000,000,000 feet of sales as nearly as may be determined, $3,800,000." 1333

When the special Master's report came before Judge Hand, for review, he stated:

"For working capital I take $2,000,000, not because I mean to fix any such sum but as a conservative compromise between complainant's figure of $3,800,000 and Maltbie's $1,480,000" (p. 181a). 1334

In the first place, the Master fell into grievous error in holding that Mr. Little had given any figure at all for working capital so far as this company is concerned. Mr. Little did not give any testimony whatsoever concerning working capital upon his direct examination, but when he was upon the stand and under cross examination the Master seized upon the opportunity to try to extract from him some figure concerning this subject. Pressed by the Master, he gave a figure used in another forum in connection with the 1335

1336 *People's Gas Company of Chicago.* The testimony to which the Master refers will be found on pages 11326, *et seq.*, of the record.

Mr. Little was asked:

"Q. Now, have you made any study of the working capital, so far as the Consolidated Gas Company is concerned? A. No.

1337 Q. Do you mean to be understood as saying that you know that sum should be allowed for working capital in this case by the Consolidated Gas Company?

Mr. Ransom: Objected to.

The Master: I will allow it.

1338 Mr. Ransom: Exception.

A. I don't know.

Q. Have you made any study of accounts receivable from 1906 to 1918, so far as they relate to this company? A. No.

Q. Have you made any examination of the cash on hand by this company, and in its branch offices, so far as working capital is

1339 concerned? A. No.

Q. Have you made any analysis of the amount due from the City of New York and the dates of payment, so far as they relate to this company, in the light of working capital? A. No.

Q. Have you made any analysis of materials and supplies account, so far as they relate to this company, 1906 to 1918, in the

1340 light of working capital? A. You mean the Consolidated Company?

Q. Yes. A. No.

Q. From the time 1906 to 1919. Have you made any analysis or examination of the coal and oil consumed year by year, 1906 to 1919, by the Consolidated Gas Company, with reference to working capital? A. No.

Q. Have you made any analysis of oil con- 1341
sumption, of the relation of oil on hand to the amount consumed by the Consolidated Gas Company so far as working capital is concerned? A. Over the same years?

Q. Yes. A. No, I have not.

Q. Have you made any analysis or examination of records of the company of coal on hand at various dates, 1906 to 1919, in the 1342
light of working capital?

Mr. Ransom: I object to these questions to the witness. He is showing he is almost as well qualified on working capital as Professor Maltbie.

The Master: Question allowed.

Mr. Ransom: Exception. 1343

A. No.

Q. Have you made any analysis of the production expenses, separating labor from materials, so far as they relate to this complainant company, 1906 to 1919? A. Not over those full number of years, no.

Q. Have you made any analysis of the dis- 1344
tribution, general and commercial expenses of the Consolidated Gas Company covering those years, 1906 to 1919? A. No.

Q. Have you made any examination of gas appliances rentals, including supplies, of the Consolidated Gas Company for 1906 to 1918, or 1919, inclusive? A. No, I have not.

Q. Have you made any analysis of the re- 1345
lation of gas sales to accounts receivable covering 1906 to 1919, inclusive, of this company, complainant company? A. No.

Q. Have you made any examination of the accounts relating to refunds under the injunction proceedings of 1905, so far as they

1346 relate to this company? A. I have made no analysis of them, no.

Q. And I will ask you this direct question: And you do not mean to be understood as suggesting or testifying to any amount which should be allowed the Consolidated Gas Company in this case as working capital for any time?

1347 Mr. Ransom: Objected to.

The Master: Objection overruled.

Mr. Ransom: Exception.

A. That is correct.

Q. Now, will you please explain what you had in mind when you testified in regard to
1348 working capital on questions put by the Master and Mr. Ransom?

Mr. Ransom: Question objected to.

The Master: I will allow that.

A. I had in mind what I thought was fair at the time I put in my testimony in the People's Gas Company case in Chicago, as
1349 the excerpts from the transcript of the stenographer's notes in that case were read to me by Judge Ransom, and I have no reason to change my opinion given at that time in reference to the People's Gas Light & Coke Company.

Q. Now, isn't it the fact that working capital is something that is peculiar to each com-
1350 pany and each situation has to be studied by itself? A. Positively, yes.

Q. That is, there can nobody reasonably fix an amount for working capital unless they have studied along the lines of these questions I have asked you? A. Yes, sir, and others, yes.

Q. These analyses, some of them at least, and perhaps all of them, would have to be gone into? A. I think so, yes" (pp. 12548–12559, fols. 37642–37676). 1351

We submit that this chapter in the trial of this case speaks for itself, and establishes that the Master's finding is not supported by the testimony and is not entitled to any weight and the court below properly rejected the Master's figure of $3,800,000. 1352

The only testimony in the case on working capital, so far as respondent was concerned, was given by Mr. Carter, Secretary of the respondent, on behalf of the company, and by Milo R. Maltbie and E. W. Bemis for the appellants. 1353

Mr. Maltbie testified he was a public utility consultant and had been a member of the Public Service Commission of the First District, from 1907-1915, and represented the State Railroad Commission on valuation before the Inter-State Commerce Commission from April, 1915, to July, 1915, and was at one time a member of the Advisory Board of Interstate Commerce Commission, advisor to the Mayor of the City of New York upon gas and electric light and telephone rates, City Chamberlain of the City of New York, where he had occasion to handle from eight hundred million to a billion dollars a year, and while a member of Public Service Commission handled problems arising out of the issuance of stocks and bonds and capitalization of companies, which cases involved amounts totaling $620,000,000, and that he in the last few years had made a special business of investigating rates of public utilities compa- 1354 1355

1356 nies, and had testified in numerous cases (pp. 12502-12512, fols. 37505-37536).

He testified working capital to be the materials and supplies, the cash or capital in any form, which a company must provide in advance of funds being repaid to it by collections from consumers, such capital being the amount upon which
1357 it is required to pay either dividends or interest. It does not include funds or property upon which the company is not required to pay interest or dividends, and that it is not proper to determine working capital by adding together the amounts shown upon the company's books for cash on hand, materials and supplies and accounts receiv-
1358 able. He said that for the year 1918, the amount of cash necessary for working capital and for working capital only, should be $550,000 (pp. 12512-12517, fols. 37537-37551).

Mr. Maltbie pointed out that the respondent does not manufacture all of the gas which it sells; that it pays its bills to the Astoria company about
1359 the 20th of the month, and consequently does not have to advance money for materials and supplies and for pay rolls during the month which a company would ordinarily have to advance. Manifestly, the amount of money which it has to have on hand to carry that business is smaller than a company would need where it had to carry the entire amount necessary for such purpose. Also that the
1360 bills for oil and coal are paid from the 20th to the 25th of the month, so that a large part of the two most important materials consumed in operations of the company are paid from 20 to 25 days after the end of the month covered in the bills to the consumers. Also that from analysis of the

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accounts receivable, as of December 31st, for these years, and July 1st, that the amount of money due from consumers at the end of the month, as shown by these two dates, bearing in mind that they have continuous meter readings, are less than one month's bills upon the average to consumers, which indicates that consumers upon the average 1362
pay their bills to the company about 20 to 25 days after the bills are rendered. Taking into account all of these matters, he said, that from 2 per cent. to 3 per cent. is ordinarily all that is required in cash to provide against operating expenses before the Company is able to collect the money from its consumers (p. 12519, fols. 37555-37557). 1363

He further stated that he had increased the amount for 1918 because of the fact that during the war and because of the uncertain conditions then existing, the company was entitled to a little more than under ordinary circumstances (p. 12521, fols. 37561-37562).

He also stated that he had made a study of all 1364
of the items carried by the company for the entire period of 1906-1918, both as to cash and as to materials and supplies of various sorts (p. 12521, fol. 37563). He then testified an allowance should be made for materials and supplies in 1918, which he estimated at $700,000 p. 12522, fol. 37565). He pointed out that respondent does work for other companies and not for itself alone 1365
(p. 12523, fol. 37567).

Mr. Maltbie prepared a table showing the amount of working capital which, in his opinion, was proper for the respondent company for each year, 1906 to 1918, inclusive (Table 290, Defts.' Ex. AA429, p. 12618). For the convenience of the court we print this table in full here.

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EXHIBIT AA-429

TABLE 290. WORKING CAPITAL

Year A	Materials, supplies, advance payments, appliances & cash B	Rentals paid in advance refunds due consumers C	Balance (B–C) D	2% interest on cash 6% on Amount E	Working Capital
1906	$1,380,000	$75,000+	$1,305,000—	$100,000	$1,205,000—
1907	1,490,000	90,000+	1,400,000—	110,000	1,290,000—
1908	1,520,000	100,000+	1,420,000—	110,000	1,310,000—
1909	1,560,000	630,000	930,000	110,000	820,000
1910	1,610,000	590,000	1,020,000	120,000	900,000
1911	1,680,000	620,000	1,060,000	120,000	940,000
1912	1,670,000	640,000	1,030,000	130,000	900,000
1913	1,700,000	660,000	1,040,000	130,000	910,000
1914	1,730,000	690,000	1,040,000	140,000	900,000
1915	1,680,000	720,000	960,000	130,000	830,000
1916	1,750,000	750,000	1,000,000	130,000	870,000
1917	1,940,000	770,000	1,170,000	150,000	1,020,000
1918	2,390,000	910,000	1,480,000	180,000	1,300,000

1367

1368 Mr. Maltbie further testified that he had analyzed the accounts receivable of respondent company, 1906–1918, made an examination of the amount in cash on hand in the branch offices of the company for 1906 to 1918, analyzed the amount due from the State of New York, the dates of payment to the respondent, analyzed the materials and supplies account of respondent for

1369 the same period, analyzed the coal and oil consumed year by year by respondent, 1906 to 1918, inclusive, ascertained the relation of oil on hand to the amount consumed for the same period, analyzed the coal on hand for the various stations for certain years, analyzed the production expenses of respondent, separating labor from

1370 materials and supplies, analyzed distribution of general and commercial expenses, including separation of accounts and those not paid in advance covering the same period, analyzed the account for gas appliances, and rentals of stoves, made examination in relation to gas sales, accounts receivable, 1906 to 1918, inclusive;

analyzed the account of the refund under the injunction proceedings of 1905, and took into consideration the fact that the company had on hand as unaccounted-for rebate under the prior suit approximately $430,692.63 (pp. 12611-12621). 1371

Edward W. Bemis, another witness for the defendants, and who has been engaged in the appraisal and adjustment of rates for public utilities for many years, throughout the country, and who had testified in many rate cases before the Public Service Commissions and the courts, fixed the amount of working capital for the respondent, after making a careful investigation of its affairs, in the sum of $792,666.26 (pp. 12979-12980, fols. 38935-38939, Defts.' Ex. AA-450). He also took into consideration the amount which the company collected in excess of 80 cents during the prior suit and which is now in its possession, and deducted same. 1372 1373

In the prior suit Mr. Carter testified that the company should have a working capital of $3,616,470.08, and in the present suit he said it should be $4,625,000 (p. 8392). 1374

On cross examination Mr. Carter said he had made no analysis of the company's needs so far as the working capital was concerned, but based his estimate entirely upon what he said was his experience of thirty years in the gas business. For instance, in considering the materials and supplies, he stated (p. 8466, fol. 25398) that he did not enter into the question as to whether these materials and supplies were paid for, nor (p. 8751, fol. 26253) as to how much of these materials and supplies would be used in doing work for other companies. He further stated 1375

1376 (pp. 8565, 8566, fols. 25695-25696) that he had not considered the amount of $400,000 which was still in the possession of the company from the old case, but stated: " I should think that that would probably be represented in some form of investment long ago " (p. 8566, fol. 25696). He also stated (p. 8567, fol. 25701) that he took no
1377 account of the rentals paid in advance for gas appliances, which amounted to over a million dollars (p. 8569, fol. 25707, shown by books in evidence); nor for what the cash on hand might be used, whether for dividends, loans, construction for other companies, or whatever other corporate purpose might occur. Perhaps it is unneces-
1378 sary to call the court's attention to the fact that Mr. Carter was secretary of the company and vitally interested in the result.

As we have pointed out, the learned Judge in the Circuit Court in the prior suit rejected his testimony in regard to working capital.

He testified in the prior suit:

1379

> " I should consider a million dollars was a fair conservative amount of working capital such as company like ours would require for current purposes " (p. 8530, fol. 25589).

but he qualifies that statement now by saying that he meant cash.

It appeared that respondent, pursuant to the
1380 temporary injunction granted in the prior suit, had collected through the court from its consumers for a number of years while the case was in the courts, one dollar or 20 cents per thousand cubic feet, in addition to the statutory rate of 80 cents.

On December 31, 1909, this fund aggregated

$6,285,917.58, that being the approximate date 1381
when the fund was ordered returned to the consumers (pp. 2943-2948). Up to the time of the trial of this case there was a balance in this fund of $430,692.63 which has never been called for; and obviously, the company is using the same in the conduct of its business. It is quite likely from the long lapse of time that this fund will 1382
never be called for. If, as Mr. Carter says, this fund has been invested in gas properties, then to that extent the company is endeavoring to obtain a return on the uncalled-for consumers' deposits. There is no doubt but that Mr. Malthie and Mr. Bemis were right in saying that this fund should be deducted from any allowance for work- 1383
ing capital, and the Master, during the trial, expressed a like opinion. We quote from the record:

"Q. Did you have an examination made into the accounts of the Consolidated Gas Company, relating to refunds under the Injunction Proceeding of the 1905 case? * * * 1384

The Master: It is allowed. Why shouldn't that half million dollars which you have got and which you are using ——

Mr. Clark: $400,000.

The Master: $400,000 — be credited against your working capital?

Mr. Ransom: They can use it any time. 1385

The Master: I have intended to ask you that sooner or later. I will ask you now.

Mr. Ransom: Working capital is a matter of investment and the question of who makes the investment is quite immaterial.

1386 The Master: But the point of working capital is the money that you need year in and year out, and day in and day out, on the average, and month by month. Here is $400,000 that you have got and that will be called on as people wake up to the fact that they have got some claims; and in some years $40,000 or $50,000 is paid, more
1387 or less. But you have got the money and why shouldn't that be deducted from the amount you say you need for working capital" (p. 12614, fols. 37840-37842).

The figure given by Mr. Maltbie of $1,300,000 is ample for working capital.

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POINT XIV

Respondent has an unliquidated claim against the United States because the Government extracted light oils from its gas at the 99th and 21st Streets stations during a part of 1918. Until this has been decided there can be no safe basis for disposing of this case.

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As we have shown elsewhere the contracts between the respondent and the War Department for the extraction of light oil were voluntary (Complainant's Exs. 340, 341, 343, pp. 16548, 16550, 16567). We have also shown elsewhere that the extraction of light oils from respondent's 99th
1390 Street station began July 30, and ended November 8, 1918; and at the 21st Street plant began April 14, and ended November 24, 1918. This process of extraction of light oils from gas made by the respondent was known as "scrubbing the gas" (pp. 4361, 4368, fols. 13081-13082, 13104).

In the first place, the contracts between re- 1391
spondent and the United States Government above mentioned protected the respondent against loss by reason of anything done by the Government in regard to the extraction of toluol from the gas made by the respondent, particularly against loss for failure to furnish its consumers with 22 candle power. In other words, it was the 1392
intention of the Government to fully protect respondent if it failed, because of acts of the Government, to furnish consumers with the statutory candle power.

In the second place the Government entered into contracts with respondent with full knowledge that the statute required respondent to furnish to its consumers 22 candle power. At the 1393
time of the trial there was still owing respondent for residuals sold $9,695.74, which had not been collected (p. 4394, fol. 13182). In addition to that Mr. Addicks, witness for respondent, testified:

"Q. Did you make any claim to the Gov- 1394
ernment on behalf of the gas consumers because they were getting gas which was less candle power than the statute provided?" (p. 4395, fol. 13184).

Respondent's counsel objected to this question and the objection was sustained on the ground that there was no foundation for that statement 1395
that consumers were getting gas of less candle power than provided by statute (p. 4395, fol. 13184).

"Q. Did the Consolidated Gas Company make any claim to the United States Gov-

1396 ernment, by reason of the extraction of these hydrocarbonates, for loss of illuminating power of the gas?" (p. 4399, fol. 13186).

* * * * * * *

"The Witness: We were required to make a claim to the claim board.

The Master: Was such a claim made?

1397 The Witness: In the case of 99th Street gas, yes.

The Master: When was that made?

The Witness: Some time after the armistice" (p. 4396, fols. 13188–13189).

"Q. That is, the claim has not been allowed? A. It was neither allowed nor re-
1398 jected" (p. 4397, fol. 13190).

"A. Anything that is involved in either the 99th Street contract and the 21st Street contract, is still pending.

* * * * * * *

The Witness: There are numerous paragraphs in that contract, by which the United States Government undertakes to
1399 protect the company in carrying out its orders and any claims which may exist on account of that, stand as they appear in the contracts, they have been put in evidence.

* * * * * * *

The only matter that was placed before the claim board was that referring to 99th
1400 Street gas.

* * * * * * *

Q. Have you in contemplation making a similar claim for the 21st Street works or station? A. I cannot answer as to how the settlement, the final settlement of the contract will be performed. It is a matter on

which the legal advisors of the company would undoubtedly advise the officers of the company how to proceed. 1401

* * * * * * *

A. Our senior counsel, Mr. Garver, would undoubtedly be the one who would advise us.

Q. So these contracts are still open for final adjustment? A. These contracts are still open. 1402

Q. For final adjustment? A. Undoubtedly.

* * * * * * *

Q. Does the Consolidated Gas Company intend to lay a claim against the United States Government for any losses of any kind, suffered by the Consolidated Gas Company, by reason of the Government operations at these two plants, including a claim for loss in illuminating power of the gas? 1403
A. I am a vice-president of the Consolidated Gas Company, and as such I do not know that I can properly answer that question" (pp. 4397–4399, fols. 13191–13196).

* * * * * * *

"To my mind we would claim everything from the Government, covering that contract, in whatever phase that claim took. 1404

Q. That would allow you to claim loss in the illuminating power of the gas? A. It would allow us to include anything that is included in the terms of the contract.

Q. Do you not say that is included? A. If that were a part of the claim, yes.

Q. Have you any idea what the claim already filed in that regard amounts to in money? 1405

* * * * * * *

A. It is not expressed in money.

Q. Have you any idea what it amounts to yourself?

* * * * * * *

1406 A. No.

Q. Does it run up into say, half a million? Is that too much?

* * * * * * *

A. I do not know.

Q. Have you made any claims for loss of heating power of the gas of these two plants, by reason of the Government operations of
1407 the toluol contracts? A. I do not recall any claim on loss of heating power.

* * * * * * *

The Witness: The heating power of the gas is not the legal requirement of our gas.

Q. Have you any idea what you claim as damages by reason of any of these matters
1408 we have just spoken of? A. No.

Q. You cannot even give me an approximate amount? A. No.

Q. Has anybody working for the Consolidated Gas Company made any estimates or prepared any figures on the damages for these matters we have just been speaking of?

* * * * * * *

1409 The Witness: No one is preparing any figures, no. * * * I have discussed matters with the Ordnance Department from time to time with respect to that.

Q. Did you speak of figures, Mr. Addicks? A. Yes.

Q. What kind of figures did you talk about? I mean what did you suggest they ought to
1410 pay? A. I did not suggest that they ought to pay anything.

Q. When you speak of figures, what figures did you speak of? A. I spoke of some theoretical figure that some theorist had talked about.

Q. What is that; that is what I want to get? A. I do not remember the figures.

Q. Have you no idea? A. No, at this time I cannot recall" (pp. 4399–4401, fols. 13196–13203). 1411

* * * * * * *

"Q. What was the figure discussed as to the difference between being washed and unwashed gas? A. I cannot remember.

Q. Can you tell us approximately? A. I would not want to say approximately, your Honor, without having a memorandum to that effect" (pp. 4404–4405, fols. 13212–13213). 1412

* * * * * * *

Here we have it admitted that the respondent company has presented a claim to the Government for damages arising out of the transaction relating to the extraction of light oils from gas at two of the company's plants. That is to say, that while this case is pending and undetermined respondent has made some kind of a claim against the Government which is so substantial in character that it may affect the whole situation. The recovery against the Government may be so substantial that if there were any doubt at all as to whether respondent was obtaining a fair return under the statute, the amount which it may recover from the Government may be the turning point in the case. Here alone arises enough doubt to warrant a dismissal of the complaint. 1413 1414

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POINT XV

The Master erred in refusing to admit any testimony showing the tests made by the city of New York concerning the quality of gas furnished by respondent to its consumers prior to 1916. Furthermore, there were many other errors committed by the Master in the ad-
1417 **mission and exclusion of evidence relating to a compliance with the statute in regard to the quality of gas furnished by respondent to its consumers. The evidence allowed in was sufficient to establish that respondent repeatedly violated the statute in regard to candle power, and for this reason alone the bill of complaint should have been dismissed.**

1418 The statute in question provided (Chap. 125, L. 1906), among other things:

> " that the illuminating gas furnished by any such corporation, association, co-partnership or person shall have an illuminating power of not less than twenty-two sperm candles of six to a pound, burning at the rate of 120
1419 grains of spermaceti per hour, tested at a distance of not less than one mile from the distributing holder by a burner consuming five cubic feet of gas per hour, and each one hundred cubic feet of gas shall not contain more than five grains of ammonia, nor more than twenty grains of sulphur, nor more than a trace of sulphuretted hydrogen."

1420 By chapter 385 of the Laws of 1897, the Legislature prescribed that illuminating gas sold in the City of New York (some parts of city excepted) should have an illuminating power of not less than 22 sperm candles, etc., tested at a distance of not less than one mile from the place of

manufacture. It will be noted that the present 1421
statute requires the gas to be tested one mile from the distributing holder; but otherwise it is exactly the same so far as candle-power requirement is concerned.

Chapter 735 of the Laws of 1905, which is still in force and effect and which is known as Section 522 of the Charter of the City of New York, pro- 1422
vided:

> "The said commissioner of water supply, gas and electricity shall appoint inspectors who shall inspect and test the illuminating gas manufactured within the city of New York or furnished or sold to said city or to any consumer therein. The compensation of said inspectors shall be fixed by the board of 1423
> estimate and apportionment and paid by the city. The gas manufactured, furnished or sold as aforesaid shall be tested with reference to illuminating power, pressure and purity, in a suitabe manner and by proper apparatus at least once each day, and also be tested whenever the said commissioner shall direct. The inspectors shall report under 1424
> oath the results of their tests to the said commissioner daily and the said commissioner shall file the said reports in his office and the same shall be public records."

Respondent did not plead nor did it offer any evidence that it had complied with the statute in this regard, but the appellant offered an abun- 1425
dance of testimony showing that respondent had violated this statute and was violating it on the very day that the bill of complaint was verified. The Master brushed aside all of this testimony, apparently without giving it any real considera-

1426 tion, and has found that respondent complied with the statute.

The appellants were prepared to prove that respondent violated this statute in regard to the candle power by furnishing its consumers with gas of less candle power than that prescribed by statute for several years prior to 1916, but the
1427 Master ruled that he would not permit any such testimony (pp. 12776-12777, 12798-12799, fols. 38328-38331, 38392-38395). This was error.

The Master also committed other errors in regard to the candle power; for instance, he failed to permit the appellants to show that the candle power tests made by the city were mailed each
1428 day to the respondent company, thus charging it with notice and knowledge that it was violating the law (pp. 12814-12816, fols. 38440-38446).

The Master would not permit witness Birdsley, chief tester of gas for the city, to say what gas goes into the 79th Street and Grand Street testing stations (p. 12833, fols. 38498-38499). And he
1429 would not state, in accordance with Rule 46, why he refused to take the testimony.

He would not permit witness Birdsley to testify that the company is able to furnish gas of a higher candle power at the testing station than that furnished to its consumers (p. 12834, fol. 38501). He would not permit witness Birdsley to show that he sent reports of tests of the gas to the
1430 respondent company (p. 12839). He would not let witness Birdsley testify as to the tests made by respondent company or the apparatus which it used (pp. 12842, 12849, fols. 38525-38547).

The Master was opposed to the statute and hostile to it throughout the trial (pp. 11985, 13028,

12762, 12764, fols. 35954, 39083, 38285, 38292). 1431
He said:

> "In spite of this close affinity between the Consolidated Gas Company and the Standard Oil Company of New Jersey, it apparently is the fact that this 22 candle power was put in in the interest of oil companies and it is time it got out" (p. 11349, fol. 34047). 1432

He also said of this statute:

> "It just illustrates some of the stupid things the legislature does" (p. 11985, fol. 35955).

And again:

> "The trouble is we are dealing with a fool statute" (p. 13028, fol. 39083). 1433

We say respectfully, but we say it nevertheless, that the Master, in the frame of mind in which he found himself concerning this statute, allowed the evidence of the appellants, showing that respondent had violated the statute, to have very little 1434 effect upon him, and it is not surprising, considering the attitude which he took toward it, that he failed to give this phase of the case the requisite attention.

We have already called the court's attention to the fact that the tests for candle power should be made in a "suitable manner and by proper 1435 apparatus." That is the only way in which the gas was required to be tested.

The appellants called as witnesses the various inspectors who made the candle power tests, and the result of their testimony shows that the tests

1436 which they made were in all respects in full compliance with the statute (pp. 12799-12855, fols. 38396-38563). As a matter of fact, respondent's witness Addicks admitted that there was a well-known method of testing gas. Appellants offered to show by witness Birdsley, the official tester for the city, that the tests made by the city were made
1437 by a well known, proper and competent method, but the Master declined to permit such testimony, although Mr. Birdsley was a qualified chemist and had been engaged in the testing of gas many years (pp. 12842-12849, fols. 38525, 38547).

Mr. Birdsley further testified he was acting chief examiner of the Department of Water Sup-
1438 ply, Gas and Electricity, and that it was his duty to supervise the testing of gas at the various stations, and that he had been in that particular department from 1906, first as an inspector of gas and then later as acting chief gas examiner (pp. 12660-12661, fols. 37980-82). He stated that there were two testing stations — one known as the
1439 Grand Street station and the other the East 79th Street station (pp. 12660-1, fol. 37981). Also that the tests made were on what he calls the Sugg-Letheby Photometer (p. 12665, fol. 37994). Although Mr. Birdsley was eminently qualified, the Master would not let him state whether the method used by the department for testing gas was a proper one (p. 12665, fol. 37995). Nor
1440 would the Master let him say whether it was a well known or well recognized method (p. 12666, fol. 37998). Mr. Birdsley described in detail exactly how gas was tested (pp. 12667-12668, fols. 37999-38003).

In this connection, the testimony of Mr. Woods

(pp. 5093-5096, fols. 15277-15288) is corrobative proof that the methods followed by the city testers were in accordance with the accepted practice and were calculated to obtain accurate results. Mr. Woods explains fully the reasons for correcting the observed candle power of gas for temperature, pressure and the rate of burning of gas used. 1441

Mr. Birdsley testified that he had seen testing done by the respondents' testers at its works and testing stations (p. 12670, fol. 38010), and that there was no difference between the way in which the company tested and the way in which he made his tests (p. 12671, fol. 38012). 1442

Mr. George E. Woods, witness for the respondent, corroborated witness Birdsley's testimony as to how the tests were made by the company at its testing stations (p. 5093, fols. 15277-15280). He said a method such as later described by Mr. Birdsley was called the "Standard method" (p. 5093, fol. 15277). Mr. Woods said that the tests made by the company were accurate (p. 5252, fol. 15756). 1443 1444

The Master would not allow the defendants to show that the tests made by the city were mailed each day to the respondent (p. 12814, 12815, fols. 38442-38443). Still Mr. Woods testified on behalf of the company that the respondent did get postal cards daily from the Department of Water Supply, Gas and Electricity, as to the tests of gas by the city (p. 5259, fol. 15777), and Mr. Addicks, vice-president of respondent company, testified he knew of the tests made of the illuminating power of gas, and that the city sent daily postal cards which purported to represent the tests of gas, etc. (p. 4232, fols. 12695-6). 1445

1446 The tests made by the city were accurate and correct and in full compliance with the statute, and they were not challenged by respondent during the trial. In spite of this, the Master's prejudice against the statute has led him so far that in three sentences he practically disposes of the entire work of the gas inspecting bureau of the De-
1447 partment of Water Supply, Gas and Electricity. The Master says (p. 58a):

> "I am not at all satisfied that the city inspectors were in all cases correct in their observations. The gas was not tested in the manner which the statute seems to require. It is unnecessary for me to go into details of this gas testing."
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Does it not seem that a judicial officer who will thus condemn a department of the city government which is maintained at a great expense to the taxpayers, should at least point out in what respects the department was at fault? He states that it is not necessary for him to go into the de-
1449 tails of the gas testing, and it is respectfully submitted that the reason he did not think it necessary to go into the details of the gas testing was his prejudice against the statute.

As an easy way of deciding this candle power question he has taken the report of Mr. Hine, attached to the opinion accompanying an or-
1450 der of the Public Service Commission, which he refers to on pages 52 and 53 of the opinion. Aside from the fact that this report was not sworn to, there was no indication that the tests made were in any way whatever different from those made by the city inspectors, or made by men more expert in the testing of gas. The entire report

is useless for the purpose for which it is used by the Master, for the reason that it does not give the number of violations of the statute, but only the average over a period of the candle power found in a comparatively small number of tests. 1451

The statute in this case does not provide that the respondent company must furnish an average of a certain candle power over a period, but it intends that at all times the candle power must be of the required standard, and that any infringement is a violation which is punishable by the penalties imposed by the statute. 1452

The appellants offered to show by a letter, dated November 30, 1917, sent by R. A. Carter, Vice President of the Consolidated Gas Company, written to the Public Service Commission, that the respondent had 609,264 consumers who were using 1,507,038 open-flame burners, and that the balance of 236,200 consumers were using incandescent mantle lights and electric lights; that this letter was written and the signature upon it were not disputed, but the Master would not allow it in evidence and this we claim was error (pp. 13004–13006, fols. 39010–39017). 1453 1454

The purpose of this testimony as fully explained by the appellants. While Mr. Little was testifying something was brought out on cross examination about 22 candle power standard being out of date (pp. 11318-11319). The appellants desired to show by Mr. Little, on re-direct examination, that had he known that there were so many consumers using open-flame burners he would express no opinion concerning 22 candle requirement, and would have testified had he been permitted, that the open-flame burners required a 22 candle power statute. 1455

1456 What occurred at this point in the testimony is so extraordinary and so aggravated that the appellants claim they should have a new trial, for this reason alone.

" Mr. Chambers: I want to call Mr. Little.

The Master: What is this on, entirely new matter?

1457 Mr. Chambers: Yes, I would say so.

The Master: Well, I won't say so. Let me hear what the subject is. If it is anything which was touched on in his examination, the direct, the cross, the re-direct or the re-cross, or whatever it is.

1458 Mr. Chambers: The subject was.

The Master: Then I won't take it.

Mr. Chambers: Wait a minute.

The Master: Mr. Little, leave the stand. What is the subject matter?

Mr. Chambers: The number of open flame burners in existence in Manhattan and what
1459 he would say about candle power, if he assumes that my number of open flame burners is correct, which I will prove, just that one question.

The Master: What is that on, the question of the usefulness or wisdom of the law?

Mr. Chambers: Well, I would not say that.
1460 He would say whether it would be possible to dispense with candle power, assuming that number of open flame burners.

The Master: No, I won't take it. That is not useful in this case.

Mr. Chambers: Let me put the question.

The Master: No, I won't let you call the witness for the purpose stated. 1461

Mr. Chambers: Let me put the question to him.

The Master: No, I won't let you recall the witness for the purpose stated. I will give you an exception.

Mr. Chambers: I did recall him. 1462

The Master: I refused to let you recall him, and I give you an exception.

Mr. Chambers: I wanted to recall him for the purpose of asking him if there were in the City of New York, the Boroughs of Manhattan and The Bronx, out of a total of 845,473 gas consumers of the Boroughs of Manhattan and the Bronx, 609,264 using flat flame burners. 1463

The Master: What do you mean by flat flame burners?

Mr. Chambers: No, wait. 609,264 consumers were using 1,507,038 flat flame burners, and that the balance of 236,209 consumers were using incandescent mantle lights and electric lights —— 1464

The Master: If the 22 candle power statute were changed this would all be changed.

Mr. Chambers: No, with this number of consumers using flat flame burners you would have to have 22 candle power in the city. 1465

The Master: But if you had some other standard you could change the burner, couldn't you?

Mr. Clark: They would have to burn more gas to get that much light.

1466 The Master: I am not going into it.

Mr. Chambers: I want to show by Mr. Little that if that is so ——

Mr. Clark: You have already expressed yourself on it.

The Master: I did not; it was Mr. Little. I am not going to litigate here the wisdom of
1467 this statute.

Mr. Clark: The newspapers have tried one side of it.

Mr. O'Brien: Your Honor, Alten S. Miller, in a matter now pending before Judge Greenbaum, an application of the Kings County
1468 Lighting Company for leave to present further testimony, to open their case, quoted the statement made by Mr. Little, and I submit that in fairness to the witness himself, he has been quoted in the public prints and quoted in that affidavit, it is no more than fairness that he be allowed to answer the question that Mr. Chambers wants to put to
1469 him about that matter.

Mr. Chambers: I would like to do it.

The Master: No.

Mr. O'Brien: You see, he has been asked a question and it is on record, and there is no chance to explain it unless he is asked this question, or similar questions. I think it is
1470 a fair proposition.

The Master: It may be fair, but I am not going to go into it in this case.

Mr. O'Brien: But, your Honor, there is a statement made there, and it is going into the record. Will you strike out the state-

ment from the record made by the witness Little as to candle power? 1471

The Master: No.

Mr. O'Brien: Well, you have said that it was not material in this case.

The Master: I won't strike it out.

Mr. O'Brien: Do you consider it immaterial? Will you say that on the record? 1472

The Master: No; I won't say it either way. I do say that I do not see that this litigation can be affected.

Mr. Clark: I offer in evidence letter dated November 30, 1917, signed by R. A. Carter, Vice President of the Consolidated Gas Company, to the Public Service Commission for 1473 the First District, 120 Broadway, New York City.

Mr. Chambers: You don't dispute the signature, do you, Mr. Ransom?

The Master: No, of course, he does not.

Mr. Ransom: I do not. 1474

The Master: You offer this letter in evidence?

Mr. Clark: I do.

Mr. Ransom: I object to it as immaterial and incompetent, no bearing on any issue in this case.

The Master: Objection sustained. 1475

Mr. Clark: Exception.

Mr. Chambers: That is, you will not let us show the admission by the company of how many open flame burners are used?

1476 Mr. Chambers: It becomes very material, this statute.

Mr. Clark: It has already been put in evidence. You have expressed yourself to the effect that it is a fool statute, and asked Mr. Little about it.

The Master: I based it on Mr. Little's tes-
1477 timony.

Mr. Clark: You opened the question, you opened the issue, and it has been tried in the newspapers.

The Master: This case is going to be finished upon the issue of this case. If Mr. Little is in town when this case is completed,
1478 and I can let Mr. Little explain the statement that he made for his own protection on the record, I am going to let him do it, but I am not going to let it go in now.

Mr. O'Brien: If he is not in the city, will you receive an affidavit from him to that effect?

1479 The Master: No, I won't do that, because Judge Ransom might want to cross examine him, on the explanation that he then wants to make.

Mr. Chambers: Your Honor, I think that letter is very material.

The Master: I am not going to take it at
1480 this time. That is all there is about it. If this case is quickly disposed of, and we can spare a few minutes to let Mr. Little explain the statement he made, then I may let him do it. I am inclined to do it, because I see where perhaps he may be annoyed by being faced with this statement, and may want to cover himself.

Mr. O'Brien: He is right here now, and he 1481
may not be here later.

The Master: I don't want to do it now.

Mr. O'Brien: I think an unfair advantage has been taken by a witness in another case, who has given that statement without any explanation.

1482

The Master: I am not worried about Judge Greenbaum's troubles.

Mr. O'Brien: I think in fairness to the witness, he has some rights in a court of equity, and your Honor asked him the question.

The Master: I am going to dispose of it 1483
on a strictly legal basis, if I cannot do it any other way. I let Mr. Chambers recall Mr. Little after I said I would not permit any more re-direct. That was the time to cure this. It is now too late.

Mr. Chambers: It was new discovery.

Mr. O'Brien: I except to your Honor's re- 1484
fusal to permit us to do that" (pp. 13002-13007, fols. 39004-39021).

Handicapped as the appellants were by the refusal of the Master to permit them to show violations of this statute prior to 1916, the evidence which was allowed in shows conclusively that re- 1485
spondent repeatedly violated the statute from 1916 down to the time of the trial, and was violating it on the very day the complaint was verified and the very day the complaint was filed in the United States District Court.

1486 For the convenience of the court we submit here a table showing the number of violations:

	1916	1917	1918	1919
January	83	73	240	124
February	70	53	208	67
March	58	45	157	103
April	39	31	129	97
1487 May	22	31	151	36
June	52	88	221	82
July	37	58	260	53
August	42	103	263	55
September	70	69	230	84
October	84	44	260	57
November	73	119	222	42
December	52	101	188	68
1488 Total	682	815	2,529	868

This is a tabulation from the official tests of the city admitted in evidence as Exhibits AA430, AA431, AA432, AA434, AA435, AA435½, AA436, AA452, AA453, AA454, AA455, AA456, AA457, AA458, AA459, AA460 and AA461, pp. 18770,
1489 18808, 18848, 18887, 18928, 18963, 19042, 19080.

The record of daily manufacture of respondent at the 21st and 99th Streets stations in evidence also shows violations substantially as numerous as those shown by the above table; that is to say, the company's own records show repeated violations and the appellants endeavored to offer
1490 tabulations of these violations, but the Master declined to take them. However, the books were already in and they corroborated the violations found by the City through the City's tests.

We claim that it was reversible error for the Master to refuse to permit these tabulations in

evidence. Mr. Mylott was called as a witness and 1491
testified that he made a tabulation of the candle-
power data of the daily record of the manufacture
of the 99th Street station, and the same for the
21st Street station, 1916 to 1919, inclusive; that
these were all carefully taken from the books,
and upon his tabulation he put the company's
tests and the City's tests as found in the books; 1492
and that they were correct, but, as we have stated,
the Master declined to take them. (Pp. 14885-
14894; fols. 44654-44682; Exhibits AA522 and
AA523 for Identification, pp. 19595, 19603.)

Even during the period when the United States Government was extracting light oils from the gas during 1918, there was no excuse for a vio- 1493
lation of the statute in regard to candle power.

Respondent throughout this case claimed that
during 1918, while the Government was extract-
ing light oils from the gas made at some of its
plants, this afforded an excuse to furnish to its
consumers gas of a candle power of less than
22. At the 99th Street station the Government 1494
began to extract light oils on July 30, 1918, and
continued such extraction to November 8, 1918
(pp. 4355, 4361, 4368, fols. 13054, 13081, 13082,
13104), and at the 21st Street station the extrac-
tion began April 14th and ended on November
24, 1918 (fols. 13054, 13081, 13083, 13104).

The two contracts between respondent and the 1495
Government for the extraction of light oils from
gas made by complainant for use by the Govern-
ment during the war were entered into volun-
tarily (p. 4354, fol. 13062; Complainant's Exs.
340, 341; pp. 16548, 16550; Ex. 342, p. 16566 and
Ex. 343, p. 16567).

1496 Mr. Little testified positively, notwithstanding the extraction of the toluol from the gas, complainant could have served its consumers throughout that period with gas of 22 candle power (pp. 12143, 12144, fols. 36429–36431).

The respondent company makes the contention that the Government commandeered its plant and
1497 thereby it was relieved from complying with the statutory obligation to furnish 22-candle-power gas. On that point the case of *Town of North Hempstead* v. *Public Service Corporation of L. I.*, 176 N. Y. Supp., 621, is apparently conclusive. That was a case in which the defendant corporation owned a franchise to maintain and operate
1498 gas mains, pipes, etc., in the Village of North Hempstead. The corporation claimed that it was unable to lay pipes as required by its franchise because of the official action of the War Industries Board created by an Act of Congress on August 29, 1916. The court, however, held:

1499 "I am fully satisfied that the present case does not come within any of the exceptions to the general rule * * * it may be conceded that the rules and regulations of the war industries board greatly increased the difficulty and probably the expense of securing pipe; but the difficulty so created stands in no other or different category than if created by any other cause or
1500 unforeseen contingency, such as scarcity of labor, strikes, increased taxation, or demands in excess of the supply. The controlling consideration is that neither the acquisition nor the use of the pipe for the purpose of fulfilling the obligation assumed by the defendant was forbidden or rendered illegal by any act of 'the law.' Official action increased

the difficulty of performance, but imposed thereon no taint of illegality, and I am of the opinion that none of the cases hold that performance is excused by such a situation as is disclosed in this case" (p. 625). 1501

See also case of *Mawhinney* v. *Millbrook Woolen Mills, Inc.*, 105 Misc., 99. In that case the defendant company failed to deliver certain goods which it contracted so to deliver, alleging that its entire plant had been commandeered by the act of the Secretary of War after the contract in question was entered into. The letter commandeering the plant was as follows (p. 10): 1502

"The President of the United States, by virtue of and pursuant to the authority vested in him, and by reason of the existing emergency requiring such action for the national security and defense, does hereby requisition for public use connected with the common defense, and hereby places an order with you for the following necessary supplies: 1503

'(a) All cloth in your possession now ready for delivery to the United States Government. 1504

(b) All cloth now in process of manufacture by you for the United States Government, the same to be completed to conform to the requirements of your contract.

You are further directed to utilize all machinery under your control exclusively in the production of cloth contracted for the use of the Government, and as required by Section 120 of the Act of June 3, 1916 (39 Stat., 213), you are hereby required in filling this order to give preference thereto over all work for parties other than the United States Gov- 1505

ernment without regard to the order or date
1506 of contracting therefor.' ''

In spite of the commandeering of the plant of the defendant in that case the Court held, in a learned opinion by Mr. Justice Kelby, that this was not a taking under the meaning of the statute and that it did not excuse the defendant from de-
1507 livering the goods that it had contracted to deliver.

How much stronger is the present case where the obligation on the respondenti is not a mere private matter of contract, but was the sacred obligation imposed by the voice of the people on its servant.

We have a very clear record here of violation
1508 of the law by this company covering such a long period of time that it must have been wilful.

Respondent was bound to obey the law, and the appellants have proven beyond all reasonable doubt that respondent was a chronic violator of the law and the statute.

Respondent has come into this court of equity
1509 with the fact established against it that it has repeatedly violated the law, and the complaint for this reason alone should be dismissed.

The doctrine that

> '' Those who come into a court of equity must come with clean hands and a pure conscience ''

1510

is so well settled that citations of authority need hardly be made. This doctrine has been enunciated in a great many cases, and it has always been the rule that equity rebukes fraud and encourages fair dealing with the public.

Pomeroy in his excellent work on equity juris-

prudence, 3rd Ed., Sec. 397, Vol. I, speaking of this, says: 1511

> "It says that whenever a party who, as an *actor*, seeks to set the judicial machinery in motion, and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him *in limine;* the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy." 1512

The rule for which we are contending was clearly stated in the case of *Michigan Pipe Co., et al.*, v. *Freemont Ditch Pipe Line & Reservoir Co., et al.*, 111 Fed. Rep., p. 284, Circuit Court Judge Sanborn, writing in that case, said (p. 287): 1513

> "A suit in equity is an appeal for relief to the moral sense of the chancellor. A court of equity is the form of conscience. Nothing but good faith, the obligations of duty and reasonable diligence will move it to action. Its decree is the exercise of discretion — not of an arbitrary and fickle will, but of a wise judicial discretion, controlled and guided by the established rules and principles of equity jurisprudence. One of the most salutary of these principles is expressed by the maxims, 'He who comes into a court of equity must come with clean hands' and 'He who has done iniquity cannot have equity.' A court of equity will leave to his remedy at law — will refuse to interfere to grant relief to — one who, in the matter of transaction concerning which he seeks its aid, has been wanting in good faith, honesty or righteous dealing. While in a proper case, it acts upon the conscience of a defendant to compel him to 1514 1515

1516 do that which is just and right, it repels from its precincts remediless the complainant who has been guilty of bad faith, fraud or any unconscionable act in the transaction which forms the basis of his suit" (1 Pom. Eq. Jur., Secs. 397, 398, 400; *Medicine Co.* v. *Wood*, 108 U. S., 218, 227, 2 Sup. Ct., 436, 27 L. Ed., 706; *Marble Co.* v. *Ripley*, 10 Wall., 1517 339, 357, 19 L. Ed., 955).

Has not the respondent been wanting in good faith with its consumers? Has it been dealing righteously with its consumers?

The statute guaranteed the quality of the gas that the consumers were to receive. Respondent has not lived up to this standard and has been 1518 selling its consumers gas less valuable than that guaranteed by the statute, yet collecting from its consumers the same price for an inferior commodity that it was to receive for the quality guaranteed by the statute.

In so recent a case as the *Kings County Lighting Co.* v. *Lewis*, decided in January, 1920 (110 1519 Misc., N. Y., 204), it was held that failure to comply with this requirement in the statute was fatal to a right to recover.

That action was brought by respondent to test Chapter 604 of the Laws of 1916, which is substantially the same as Chapter 125 of the Laws of 1906, and in the statute there was substantially 1520 the same provision in regard to the requirement of 22-candle-power gas to be furnished the consumers. The claim that the statute was confiscatory was upon the same grounds as urged by complainant here for the construction of the statute in question.

Mr. Justice Greenbaum, in the course of his 1521
opinion, said (p. 248) " that the quality of gas manufactured during 1918, was far below the candle power prescribed. * * * "

And, again (p. 249):

" It was not denied that the plaintiff regularly received copies of the daily reports of the official inspections, and, moreover, the 1522
records of previous years show a substantial compliance with the requirements of law in respect of the candle power of the gas sold by plaintiff. In view of these facts and in the absence of any explanation of this seemingly flagrant violation of law, the conclusion seems to be inevitable that the plaintiff's violation of law was deliberate. 1523

The daily tests of gas made by the legal inspectors established that the average quality of gas supplied by the plaintiff during 1918 was an average of thirteen and fifty-seven hundredths candles instead of twenty-two candles, which is the minimum prescribed by law. It follows that the consumer was either compelled to consume a greater quantity of 1524
gas measured by the ratio of twenty-two to thirteen and fifty-seven hundredths at a correspondingly increased price to him or that he suffered from the loss of light in the ratio of thirteen and fifty-seven hundredths to twenty-two, for which he paid the price charged for gas of a twenty-two candle power standard.

How can one foretell how much increased 1525
business the plaintiff would have had if it had furnished the legal twenty-two candle power instead of the very considerably diminished candle power that it furnished in 1918? The use of gas has been largely extended during the past few years for cook-

1526 ing, heating water, house heating and other purposes. A standard quality of gas should insure a more extensive use of gas. At any rate a fair test under the law cannot be made except by compliance with the law which fixes the standard of quality.

Moreover, it may well be urged that if the plaintiff has knowingly violated the law by selling gas of a standard lower than that
1527 fixed by law, it is not entitled to equitable relief. Observance of the law is a cardinal principle which is obligatory upon him who seeks judgment in equity."

The maxim which we referred to was clearly stated and invoked in a late decision by the Circuit Court in the case of *Carmen* v. *Fox Film Co.*,
1528 269 Fed. Rep., 928.

If it should be argued that the Attorney-General or the Public Service Commission should have taken steps to stop the flagrant violation of the statute as to the quality of gas, we point out that in the prior suit this court held that while the 22-candle power provision was valid the
1529 penalty imposed was unconstitutional.

Here is the proper place to mete out punishment for a violation on respondent's part, of the statute. The punishment is mild enough which simply denies respondent relief in the present suit.

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1531

POINT XVI

Reversible error was committed in the admission of respondent's books.

The books to which we refer are the company's books for 1918 (Exs. 188 to 200, 204, pp. 1893, 1954); the operating ledgers of the company for 1532
1906 to 1919, inclusive (Exs. 260 to 273, pp. 2871-2872); and the operating ledger, operating journal and treasurer's cash book, invoices approved, sundry creditors' ledger, payroll summaries, and sundry debtors' blotter for 1919 (Exs. 272-280, pp. 2910-2911). Also the omnibus ruling admitting in evidence "every voucher, every bill, 1533
every record, every paper, every report which is reflected in these books." These vouchers were not offered in evidence, but the Master swept them in along with the books (p. 3571, fols. 10711-10712). Later on he expressed doubt as to whether they were in (p. 3855, fol. 11564). Still later on in the case he ruled that they were in 1534
(p. 3865, fol. 11594), and thus along with the books were put in evidence over the appellants' objection, those records, vouchers and papers which were not only not offered but were never produced by the respondent.

Here we shall confine our argument to the erroneous ruling of the Master in allowing the 1535
books of this company in evidence, which error was not cured in the court below.

It clearly appeared from the testimony that the books in question were not books of original entry.

The only witness called to substantiate the books was Mr. Brundage, Assistant Secretary of

1536 the company. Mr. Brundage made no entries in the books and knew nothing of their correctness, and this was conceded by the Master (p. 1577, fols. 4729–4730).

Preliminary to a discussion of the rule of law which applies to introduction of books of account, we call the court's attention to extracts from the
1537 records which have an important bearing upon the subsequent ruling of the Master in allowing the books in. The books were not kept in conformity with the rules of the Public Service Commission (pp. 1474-1481, fols. 4422-4441). The books were not books of original entry (p. 1506, fols. 4516-4517). As the Master said:

1538 "I will never take a book that is copied from some other book. * * * Page 28 (of the operating ledger for 1918) is clearly a copy of entries made in the regular course of business in the books. It is not in any sense a book of original entry, not even on the theory that you advance, Judge Ransom" (p. 1506, fol. 4515).

1539 During the discussion leading up to the introduction of the books, the Master stated that the admissibility of them "turns on the point whether these books are books of original entry" (p. 1542, fol. 4625).

The Master himself stated that the only wit-
1540 ness, Mr. Brundage, who was called to substantiate the books, was unable to testify to a single entry being correct (p. 1577, fols. 4729-4730). The Master stated:

> "We have got a picture as clear as a bell that these books are now in evidence come from other records" (pp. 1636–1637, fols. 4908–4909).

Again: 1541

"It is just as clear as it ever can be made that in that sense these books simply summarize items in other records and cards" (p. 1638, fol. 4912).

Again:

"I do not think they are strictly speaking, 1542
books of original entry in the sense that we have always understood" (pp. 1691–1692, fols. 5073–5075).

Again:

"The trouble in this case is that these books contain a lot of items that are not 1543
based upon the kind of a record, the allocation of expense, the setting up of charges against other companies, so far as I can tell, perhaps arbitrary statements, that part of an item of cost should be applied in one way or another * * *. Now I assume that counsel for complainant, taking these books, intends to call an expert to prove the tabu- 1544
lation. In order to do that he has got to assume that some of these items are correct. I hardly think I can go so far" (p. 1692, fols. 5074–5075).

And finally the Master stated that he was not going to force the respondent to a kind of proof that would "take a year or more to prove facts 1545
that are otherwise fairly proved" (p. 1722, fol. 5166).

Again the Master stated:

"They will not be an exhibit in the case,

1546 and the testimony resting on them will fall. I do not think any harm can come from leaving them in" (p. 1853, fol. 5557).

And further:

"If an expert called with a tabulation of figures has based the tabulation purely and solely on the figures appearing in these
1547 books, I am inclined not to receive it" (p. 1865, fol. 5594).

And finally after the Master had allowed the books in evidence, he said:

"Instead of holding you to common law proof I have gone the other way; I have gone
1548 to the extreme, I think, of relieving you from common law proof. We would be trying this case for six years, if I confined you to common law proof" (p. 2740, fols. 8229-8230).

The Master further said:

"If I refused to take them (speaking of the books) and I put him to the necessity of
1549 bringing all these people and all these records, and we spend three months on that branch of the case, and Judge Ransom is right in his statement that his client is losing many thousands of dollars a day, I am doing him a pretty serious injury if I am wrong in that ruling. Isn't it my duty as a Master to support Judge Ransom and let him suffer if he has led me into an error?" (pp. 1838, 1839, fols. 5514, 5516).
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We invite the court's attention to the argument made by counsel for the appellants at the time these books were offered. The ground was fully covered at the time and we can add but little to

the oral argument made before the Master (for argument of counsel see pages 1449, 1451, 1455-1459, 1491-1492, 1515-1517, 1520-1521, 1687-1704, 1815-1823, 1823-1840, 1846-1850, 1853-1892). 1551

There is no authority that we have been able to find and we are satisfied that there is none to sustain the ruling made by the Master in regard to the admission of these books in evidence. 1552

The rule is now well established that in order to make books of account admissible in evidence, it must be shown that the entries are original entries, that they were made by persons having knowledge of the matters stated therein, and that the entries are correctly made.

As Chamberlyne says in his work on Modern Law of Evidence, Volume 4, page 4025, Section 2993: 1553

> "In the case of books of account, or those containing other entries in course of business, affirmative proof must be offered that the book has been regularly and accurately kept." 1554

Also, page 4031, Section 2900:

> "To establish the fact of a book entry, it must in some manner be made to appear that such entry was actually made by the person whose work it purports to be."

In the case of *James Wharton*, 13, Federal Case No. 7187, 3 McLean (U. S.), 492, the court said: 1555

> "This is not a book of original entries, but a mere transcript from that book made by the clerk, who did not make those entries."

And the court in that case excluded the book from the consideration of the jury. It must also

1556 appear that the entries are made by a person having knowledge of the facts entered.

Chicago Lumbering Co. v. *Hewitt*, 64 Federal Reporter, p. 314.

In that case it was held that a book in which one person sets down a total amount of logs scaled
1557 from memorandum furnished him by another person, who did the work, is not admissible to prove the amount of logs scaled unless supplemented by the person furnishing the original data.

Here we have the Master admitting in evidence these books which were conceded not to be books of original entry and no person was called to tes-
1558 tify to their accuracy. Furthermore, no person was called who made any entry in the books and no witness produced to explain why the persons who did make the entries were not called to testify.

The error of the Master was so glaring and so fundamentally erroneous that the citation of au-
1559 thority is almost unnecessary.

The Master and the court attempt to justify their ruling under the authority of the case of *Northern Pacific Railroad Co.* v. *Keyes*, 91 Fed. Reporter, 47. In that case the court was not concerned at all with books of account or entries in books, but during the course of the trial it ap-
1560 peared that a large number of tables were prepared in the accounting department of the several roads from original way bills and other voluminous admissible data, bearing upon different features of the business of the companies covering several years. These tables were compiled

pursuant to the direction of the general officers, 1561
who testified that they were correct according to their best judgment and belief. We quote from the opinion of District Judge Amidon, page 58, He says:

> "The record shows that from forty to fifty clerks were employed by each of the companies in the preparation of the different 1562
> tables. These clerks were not called to testify that the several computations made by them were correct, but the heads of departments, under whose immediate supervision the work was done, were called as witnesses, and the method of preparing the figures from which the tables were compiled was fully explained and their trustworthiness shown. 1563
> The clerks were also present in the building where the testimony was taken, as were, likewise, the waybills and other records from which they made their computations. Counsel for defendants was invited to call any of the clerks for the purpose of cross examination and was given the freest access to all the papers and records from which the com- 1564
> putations were made. He objected to the evidence on the ground that it was incompetent. The objection could not be sustained. * * * We must assume that the Attorney General was satisfied of the correctness of the testimony from the fact that he declined to investigate its truthworthiness."

It will be seen from this extract and from the 1565
opinion that books of account were not involved but only tabulations of admissible but voluminous original documents. Also the proper witnesses were offered for cross-examination.

Another case relied upon by the Master to

1566 sustain his extraordinary ruling to which reference has been made was the case of *Rayburn* v. *Queens City Savings Bank & Trust Co.*, 171 Federal Reporter, 609. The court will upon the examination of that case readily see that it does not sustain in any way the ruling made by the Master. That case involved an action on cer-
1567 tain promissory notes made by the defendant of which plaintiff claimed to have been the indorsee and *bona fide* holder for value. The learned Judge in the Trial Court directed judgment to be entered in favor of the plaintiff. The plaintiff in that case, who was the defendant below, objected that certain payments by a bank out
1568 of the proceeds of the notes could not be proved by entries in the bank's books, because they were not within the rule by which shop books and tradesmen's books of account regularly and fairly are kept as books of original entries, supported by the oath of the plaintiff himself as *prima facie* evidence of the entries therein contained.

The court in the course of the opinion (page
1569 614), says that the rule in regard to the admission of books of original entries, supported by the oath of the party to prove the transactions therein contained, is a very old one in this country and existed in England as an ancient rule of the common law, and that it was adopted by the courts as a rule of necessity. Circuit Justice
1570 Gray, who wrote for the court, said, at page 615:

> "Take, for instance, the case above. We have the entries from the discount register and the discount ledger, the first named being undoubtedly a book of original entries, and we have the oath of the clerk who made the same."

The case of *Boyle* v. *St. Louis S. & F. R. Co.*, 1571
222 Fed. Rep. 539, is relied upon to sustain the erroneous ruling of the Master, we call the court's attention to the opinion in that case which discloses that the exhibits which were criticized were agreed to by both parties as being mathematically correct. We quote from the opinion (page 547):

> "While some few errors were found in the 1572
> exhibits of each they were corrected, or, as stated by the accountants, 'ironed out' and new exhibits filed by each side which both parties agreed are mathematically correct, but each criticizes the methods and bases employed by the other in preparing these final exhibits. The case was submitted on the corrected exhibits." 1573

And when the case was in this court, 244 U. S. 106, (reported as *Rowland* v. *St. Louis R. R. Co.*, and relied upon by the court below), Mr. Justice Holmes said:

> "We have not observed that the objection 1574
> was taken when the evidence was introduced, and if not it would be too late."

Books of account were not involved there, only work sheets and data, so that there is nothing in that case that conflicts in any way with the rule for which we are contending here.

And, of course, the court there held that the 1575
admission of the tabulations was proper under the rule which we have already cited, and which was fully complied with.

The appellants during the course of the argument, relating to the introduction of the books, maintained that they were entitled to examine the

1576 persons who made the entries therein. In the course of the argument, the Master said:

> " If I sustain your view of it * * * it means, that Judge Ransom is put to the burden of bringing down a lot of records and men, and bring down vouchers, taking up weeks and weeks and months of time, for
1577 which I will be paid. Do not forget that. * * * because I will be paid no matter how I decide this case. It does not make any difference * * * but I will be doing Judge Ransom a very serious injury if I err that way. Now, if I err the other way and support Judge Ransom's contentions, he is sharing with me the responsibility for my error,
1578 because if he goes up to the U. S. Supreme Court, and they find I am wrong, he has done this for nothing and he has done his client a very serious injury " (p. 1840, fols 5518–5519).

In answer to this, counsel for the appellant, said:

1579 " Now that is not the way to try a lawsuit if the Master pleases and I protest against it and object to it. * * * You have no right as the Master, and as the umpire in this case, to let any testimony, to let in books that you know at the bottom of your heart are not admissible, by any rule of evidence, simply because if it is error he is going to be the one
1580 to suffer from it, because you must have it clearly defined in your mind just as you said, in this very clear statement, that if it is not material and should not have been admitted, the Supreme Court of the United States or somebody else is going to find it out and throw it out, and, therefore, we may not be injured " (pp. 1853–1854).

And again: 1581

> "If they should not go in, then we are harmed, even though the Court should say they ought not to have been admitted by the Master." * * * If you want to make a breach in our wall we will suffer irreparable injury in this case and our clients will suffer that which you cannot repay" (p. 1855, fol. 5563). 1582

Neither the supervisory power of the appellant commission nor the uniform system of accounts prescribed for gas corporations has any probative force.

The "uniform system of accounts for gas corporations" (Respondents exhibit 15), states 1583 the following, p. 15961:

> "In prescribing this uniform system or method of keeping accounts, records and books, to be observed by such corporation *the Commission is not undertaking that any item set out in any account will have the Commission's approval either as to amount* 1584 *or character in fixing a rate or authorizing an issue of securities.* The system or method of accounts prescribed is designed to set out the facts in connection with the income, outgo, etc., and the Commission will determine in any proceeding involving the fixing of a rate or authorizing an issue of securities just what consideration shall be given to 1585 items in the several accounts."

The most that can be said for the system of accounts is that it was designed to compel utility corporations to set forth in separate classifications their various accounts, so that they might

1586 e used for comparison and the compiling of statistics. Possibly the learned Judge below overlooked this important provision in the accounts. He makes no mention of it in his opinion.

We submit that lax, inefficient and wasteful methods, inaccuracies, errors and deceptive bookkeeping could have been discovered only by the
1587 cross-examination of the original entries and entrants. The respondent scrupulously avoided the production of original primary and direct evidence and of course the admission of the books aided it in its effort not to bring forward what appellants claimed was the best proof.

The books of the respondent were not proven
1588 *to have been kept in compliance with the uniform system of accounts. Even if they had been so kept this would have no bearing upon the accuracy of the books.*

The court below modified the Master's finding 18, (p. 31a) which was as follows:

1589 "Since January 1st, 1908, the books of account of the complainant company and of all other gas companies in the City of New York have been required to be kept in accordance with the rules and regulations of the Public Service Commission of the State of New York for the First District, which commission has had jurisdiction over said companies pursuant to the provisions of the Pub-
1590 lic Service Commissions Law of the State of New York (so-called), and I find that the books of the complainant company, as well as those of the Astoria Light, Heat and Power Company, have been kept in substantial conformity with said rules and regulations and accurately set forth the facts therein contained" (p. 193a).

It does not say that the fact that the 1591
books of account of the respondent and of the Astoria Light, Heat and Power Company had been kept in accordance with the rules and regulations of the Public Service Commission is proof or evidence of the fact that such books "accurately set forth the facts therein contained." However, the fact that he has joined these two 1592
findings together in the way that he has at least leaves it open to the inference that compliance with the regulations of the Public Service Commission would prove the accuracy of the books. It is interesting to note in this connection that the halo is placed over these books on January 1, 1908 when the Uniform System of Accounts did 1593
not go into effect until January 1, 1909 (Ex. 15, p. 15961). It is even more interesting to note that the books from 1884 to 1908 were received and given the same credit as were the books after that.

So much was said upon the trial in regard to the effect of compliance with these rules and 1594
regulations upon the presumptive accuracy of the books that we feel it necessary to take up this point at some length.

Section 66 of the Public Service Commissions Law, Chapter 84 of the Consolidated Laws of the State of New York, Paragraph 4, is as follows:

> "Each Commission shall, within its juris- 1595
> diction * * * have power in its discretion, to prescribe uniform methods of keeping accounts, records and books, to be observed by gas corporations and electrical corporations and by municipalities engaged in the manufacture, sale and distribution of

1596 gas and electricity for light, heat or power. It may also in its discretion prescribe, by order, forms of accounts, records and memoranda to be kept by such persons, corporations and municipalities. Notice of alterations by the commission in the required method or form of keeping a system of accounts shall be given to such persons or cor-
1597 porations by the commission at least six months before the same shall take effect. Any other and additional forms of accounts, records and memoranda kept by such corporations shall be subject to examination by the commission."

In accordance with this provision the Public
1598 Service Commission for the First District adopted on the 8th of December, 1908, an order in Case 578, which order was modified by a modifying order dated June 29, 1917, prescribing the Uniform System of Accounts for gas corporations. This order and the modifying order which will hereafter be designated "Uniform
1599 System of Accounts" was marked in evidence as Complainant's Exhibit No. 15 (p. 65). This Uniform System of Accounts prescribes in Schedule A, the balance sheet or indicant accounts to be kept by a gas corporation, and in Schedule B, the income and indicant accounts to be kept by such corporation. The order goes into infinite detail in the prescription of the accounts to be kept and
1600 the charges to be made to such accounts.

Evidently, the Master early in the case decided that his ruling allowing the books in evidence was going beyond anything which had been found in the reported decisions, and desired to bolster this

up by relying upon compliance with the Uniform 160
System of Accounts. He said:

> " * * * I am very much impressed by the argument that the books have been kept in accordance with the requirements or the rules of a commission that has power to make those requirements. In other words, my opinion is when a statute requires a 1602
> thing to be done and the thing has been done in accordance with the statute, I shall assume it was accurately and properly done " (p. 1707).

And again:

> " Mr. Clark: The point is, your Honor, that these companies are supposed to run 1603
> their books in accordance with accounts set up in the uniform system of accounts.
>
> The Master: Well, if they did not do it, why didn't your Public Service Commission stop it?
>
> Mr. Ransom: They have a right to subdivide accounts.
>
> 1604
>
> Mr. Clark: Because there are so many companies, we cannot go around to all these companies and tell them to change their accounts.
>
> The Master: That is no excuse. The Public Service Commission ought to have a sufficient staff to check up these accounts and, where they find them inaccurate, make them 1605
> keep them accurately " (p. 10684, fol. 32051).

This is reducing the Master's contention to an absurdity. That the Public Service Commission should have enough men to make an actual audit of all the books of all the companies in this great

1606 city all the time, is too ridiculous to need comment.

Similar expressions of opinion appear in other parts of the record, and it is evident from the finding which we have quoted above, that he has relied upon the alleged compliance of the company with the uniform system of accounts to find
1607 them to be accurate in default of any adequate proof as to the fact itself.

There are two fatal defects in the Master's reasoning; first, the books were not kept in accordance with the uniform system of accounts, and second, if they had been it would have been of no probative force as to their accuracy.

We will take up these two points in their order.
1608 (*a*) *The books of the respondent were not kept in accordance with the uniform system of accounts.*

Henry M. Brundage, the witness called by respondent company to prove the books of the company, was allowed by the Master to testify (pp. 1474-1475) as to "Whether these accounts are
1609 kept in the form required by the Public Service Commission."

He accordingly stated (pp. 1476-1482) that the books were kept in the form of the uniform system of accounts, "With the exception of a few minor points" (p. 1476). These minor exceptions he stated on pages 1477-1479 were as
1610 follows:

> "The Witness: We carry an account under the title of assessments, representing assessments made by the municipality for grading improvements and items of that sort, for which there is no provision in the

uniform system of accounts. We carry an account under the title of laboratory equipment, an asset account, for which there is no provision in the uniform system of accounts. We carry an account under the title of 'garage equipment,' for which there is no account in the system * * * 1611

We carry an account under the title of 'residuals' produced, not provided for in the uniform system of accounts, but provided for as the result of a change in the form of annual report by the commission. We carry an account under the title of 'repairs buildings general,' representing buildings other than those at works and stations, for which there is no provision in the accounting system. We carry an account under the title of automobile expense, carrying out the thought you have just expressed, because there is no provision for it at that time when the system was established. And the uniform system of accounts provides a reserve under the title of 'accrued amortization,' which we — and we establish a reserve under the title of 'renewals and replacements.' * * * 1612 1613 1614

There is a further variation from the uniform system of accounts, because of the condition, while they agreed that the system — that the methods provided under the system as promulgatd in 1908 in respect to the treatment of residuals should be changed, they did not wish to change the system, but it was amended — they did not amend their form of annual report, and while we break away from them in so far as the system of accounting is concerned, we keep our accounts in such manner as to provide the information which their form of annual report requires us to give them at the end of the year." 1615

1616 When he was under cross examination, however, it appeared that there were other provisions of the uniform system of accounts which had not been complied with (pp. 1733-1738):

"Q. Now, Mr. Brundage, I understand the other day that you said, with the exceptions you enumerated, the books of this company
1617 had been kept in strict accordance with the uniform system of accounts as prescribed by the Public Service Commission, which Judge Ransom has been talking about? A. I did.

Q. You enumerated those exceptions? A. Yes, four or five.

Q. I will ask you the same question, I ask you are there any others than those you have previously mentioned, that you would now
1618 like to tell the Master of, in which you have not followed the rules of the uniform system of accounts? A. I should say not, Colonel.

Q. You think you have covered them? A. I do not recall anything else that I have not covered.

Q. And where you found — in addition to the places where you have not complied with
1619 the uniform system of accounts as to the accounts they required you to keep, have you kept other and additional accounts independent of your uniform system of accounts— subordinate account for— A. (Interrupting.) Yes, the accounting system allows us to keep divisional accounts, if you will, and we have had occasion to do that.

1620 Q. And you have done that? A. Yes.

Q. And in connection with that are you prepared to say whether or not you have complied with the law in connection with those additional accounts? A. I do not follow your question.

Q. I will read you paragraph four of the

Order, I don't know whether it is offered or identified, your Honor, but it is the order of the Public Service Commission of January— requiring the uniform system of accounts to be in vogue after January 1, 1909, paragraph four referring undoubtedly, if I am mistaken, you correct me, to these additional accounts you are now speaking of. It says as follows: 'For purposes of improving the efficiency of the administration and operation, any corporation may unless or until otherwise ordered keep upon its books any temporary or experimental accounts and any accounts covering particular divisions of its operation.' Now, those are the other accounts that you are referring to, as I understand it? A. Yes. 1621 1622

Q. And the proviso follows: 'Provided that in respect of each such temporary, experimental or divisional account, the said corporation shall file with the Public Service Commission at least ten days in advance of the time when the said account is to be instituted, a statement showing the name of the said account, the date when it is to be instituted, the purpose for which it is to be kept, the period of time during which it is to be kept, and a clear and accurate definition of the classes of items and facts to be contained in the said account, and in case of a divisional account, the definition of the division covered. Upon compliance with the provisions of this paragraph, any account prescribed or defined in either said Schedule A or said Schedule B may be subdivided.' Now, are you prepared to state that the company has complied with that requirement of the uniform system of accounts in connection with these other and additional accounts you have testified to? A. I recall, counselor, 1623 1624 1625

1626 that when the system of accounting first came out, there was some correspondence between the Commission and the company.

Q. I did not ask you about that. You can say yes, or no. I am trying to be fair with you. Can you say whether or not — A. (Interrupting. I want to be fair with you, too.

Q. Yes, I think you are. Can you say
1627 whether or not, for instance, these are the additional accounts you testified to? * * * I will ask the witness, such other temporary or experimental or divisional accounts as the company has instituted, has the requirement of the law been complied with in connection with those accounts? A. Does the law require us to file with the Commission
1628 word of the establishment of a divisional account?

Q. Yes, for ten days prior. A. If that were the case, *I should say no.* May I point out a case to you?

Q. Certainly, I am only trying to get the facts, Mr. Brundage. A. I want to put that on the record very frankly. For instance, the Public Service Commission system, as I
1629 said the other day, does not provide for an account under the title of assessments levied by a municipality, for instance, for street grading or something of that sort. Now, an accounting man —

The Master: That is not one of those accounts.

1630 The Witness: It is one of the items I spoke of.

The Master: It is one of these that Mr. Hayward is speaking about?

The Witness.—Oh. yes.

The Master: No, that is not experimental and it is not additional.

The Witness: It is divisional. 1631

The Master: No, it is additional.

The Witness: It is divisional, your Honor.

Q. It is temporary? A. No, it is a permanent item.

Q. It is not experimental or temporary? What is the division? A. Because an accountant would construe that the company's —the Commission's accounting system where it gives us an account, "Land devoted to gas operations," the total cost of the land so acquired, an accountant would construe that the assessments paid to the municipality for permanent improvements to that land would be a proper item to capitalize under that title, and just as a matter of convenience we keep a strict separate account of assessment, but we may construe and would construe, that we are complying with that accounting system under that title. 1632 1633

Q. Well, then, that is a divisional account? A. I should call it a divisional account, and if you asked me if we complied with the Commission, I should say no. 1634

Q. You have not complied? A. No, I would say that divisional item has not been reported to the Commission. May I say, Colonel, that while we did not specifically apprise the Commission of that, every annual report that we filed, that particular item stands there as an item, and it is subject to their jurisdiction and explanation. 1635

Q. There is a provision to notify the Commission beforehand, in order that they may consult with you if necessary? A. Yes.

Q. And you did not comply with that? A. We did not with respect to that."

1636 It appears further that the account in the uniform system of accounts directed to be kept as "Trunk Lines and Mains" was carried under the title, "Street Mains" (p. 1747); that the prescribed account, "Gas Engines Leased" is called by respondent "Gas Appliances Rented" (p. 1748); that the account called for by the uniform
1637 system of accounts, "Office Equipment" is kept by the complainant under the title, "Furniture and Fixtures" (p. 753).

It appeared further (pp. 1759-1761) that the company did not carry any "Corporate Surplus and Deficit Account":

"Q. The uniform system of accounts pro-
1638 vides for keeping what is known as a surplus account in some books, doesn't it? A. The uniform system of accounts fails to provide an account divisible surplus, profit and loss or any corresponding term.

Q. You keep it as profit and loss? A. We keep it as profit and loss.

Q. Don't they provide that it be kept as
1639 surplus? A. They do not. They refer to it in several of their wordings, but there was a very serious omission in making up that wording. They failed to provide for it * * *

Q. You remember we were talking about what I said was the requirement calling for a surplus account, when we adjourned for luncheon? A. Yes.

Q. You said there was no such require-
1640 ment? A. I said there was no such account, counsellor.

Q. Do you mean there was or was not in the uniform system of accounts, a requirement for you to keep such an account? A. I mean that the uniform system of accounts fails to provide for an account under that or any corresponding title.

Q. And you did not keep any? A. We kept an account under the title of 'Profit 1641
and Loss.'

Q. Profit and Loss, but not under the head of 'Surplus'? A. No, sir.

Q. And not under the head of 'Surplus and Deficit?' A. No.

Q. I will ask you to look on page 59 of this pamphlet, paragraph 24, and see whether or not the fair interpretation of this uniform 1642
system of accounts, with an honest effort on your part and the part of the company to comply with it, would not have required your keeping what is set out in paragraph 24, called a 'Corporate Surplus and Deficit Account' (referring to complainant's Exhibit 15, p. 59)? A. My answer would be that we did make an effort and we did carry out the 1643
provisions of the accounting system, and we did close our operating revenue and operating expense account into an account which is of the nature defined in that interpretation, and we called the account, as we had for years before the Commission was established, 'Profit and Loss Account.' I again repeat that the Accounting system did not 1644
provide any account by that title or any corresponding title.

Q. You call it Profit and Loss account notwithstanding paragraph 24? A. Yes, sir."

Mr. Brundage attempts to excuse this on the ground that the uniform system does not prescribe a "Surplus Account," yet Section 24, page 1645
59, reads as follows:

"Appropriations: The balance resulting from closing the foregoing income deduction accounts for any fiscal period into gross income for that period gives the Net Corporate

1646 Income for the period. The net corporate income being of the same nature as the corporate surplus, shall be closed into the 'Corporate Surplus or Deficit' account. The group of accounts which show for any fiscal period the changes in the 'Corporate Surplus or Deficit' account are designated the Appropriation Accounts, for the reason that
1647 substantially all of them are subject only to the discretion of the corporation. At the end of each fiscal period each of the appropriation accounts shall be closed into the '*Corporate Surplus or Deficit' account.*"

How, in view of such a provision, any company
1648 really desiring to comply with the law would deliberately fail to set up a "Corporate Surplus and Deficit Account" is not readily understandable.

Mr. Carter as put on the stand by the appellants and interrogated as to the extent to which the company complied with the Uniform System of Accounts (pp. 10680-10695, fols. 32038-
1649 32084). The appellants put in evidence (p. 10688, fol. 32063) as Exhibit AA-191, a list which had been filed by the respondent in 1909 showing the accounts which the company claimed to keep as compared with the titles prescribed by the Uniform System of Accounts. This shows that there are numerous accounts which do not con-
1650 form to the accounts prescribed by the Uniform System of Accounts. Moreover, it became evident from cross examination of Mr. Carter that certain of the accounts which seemed to conform were not so kept that the results shown by these book accounts corresponded with the results in

these accounts appearing in the annual reports 1651
of the company.

Examination of Mr. Carter (pp. 10680 to 10682) shows that as to the item, " Salaries and Expenses of General Officers " appearing on the 1917 report of the respondent to the Public Service Commission, the company not only did not carry the account prescribed, but that he, the 1652
chief accounting officer of the company, could not tell from what accounts the amounts which went to make up the items in the report to the Public Service Commission were taken. We quote this at length to show Mr. Carter's early confidence that he could explain the matter and his absolute and embarrassing inability to make 1653
them check up.

" Q. Mr. Carter, in connection with the annual reports and the accounts that are set up in the general accounting order, we have found some disagreements between what appear to be the book figures and the report figures, and I would like to ask you a few 1654
questions about the accounts here, to see whether you can find the figures that appear in the reports on the books under the different accounts as set out in the accounting order. In the 1917 report, on page 57, you will find salaries and expenses of general officers (handing witness book). What is the amount there? A. The amount given here is $130,339.05. 1655

Q. Do you know where you could find that on the books of account of the company? A. May I see Mr. Teele's exhibit? Let us see it for 1918.

Q. This is page 28, I guess you want, Mr. Carter.

1656 Mr. Ransom: That is the 1918, and you are showng him the 1917 report.

Mr. Clark: That is right, I think he is looking at the ledger folio.

A. I find that the corresponding item for 1918 was $133,540.41, and that that appears upon folio 998 of the operating ledger.

1657 The Master: I thought Major Clark was asking you about 1917.

The Witness: Well, we have not any corresponding report here. I am simply trying to identify the item in 1917 which would correspond with the item in the 1918 report, to the Public Service Commission,
1658 with a summary made up by Mr. Teele for 1918.

The Master: Is the 1917 ledger here?

Mr. Clark: Yes, it is here.

The Witness: Let me look at the 1917 (examines book). The office copy of this report would probably contain the original
1659 compilations from which this account appearing in the reports for the year ending December 31, 1917, page 57 of the report, is made up, amounting to $130,339.05.

The Master: What is the title of the account?

The Witness: Salaries and expenses of
1660 general officers.

Q. Do you carry any such account in the reports? Do you carry any such account as that?

The Master: Of that exact title.

Mr. Clark: Of that exact title? 1661

A. That combines two items.

The Master: Do you carry an account of that exact title?

The Witness: No, not the exact title; but we do show on page 883 of the operating ledger salaries, general office, and under the column headed 'General Officers' ap- 1662 pears as the aggregate of salaries paid to general officers for the year the sum of $128,291.48.

The Master: So there is $2,000 still to account for.

The Witness: Under the general office 1663 supplies and expenses appears expenses — officers, account headed 'Officers,' the aggregate of the amount for the year being $1,881.44. The aggregate of those two items of $130,172.92. That is $166.13 less than the item appearing in the report for the year 1917 covering those two items" (pp. 10680–10682).

1664

Further evidence of the failure of the company to keep its books in accordance with the uniform system of accounts is found by comparing certain of the accounts as set up in books with corresponding accounts as returned to the Public Service Commission in the annual reports of respondent. The book figures appear in Exhibit AA-129 1665 introduced in evidence (p. 10,404) which is entitled 'Details of Accounts included in Operating expenses 1906 to 1918," and is a transcript made by the statisticians of the Public Service Commission from the books of the company. The fig-

1666 ures in the reports rendered annually to the Public Service Commission appear in Defendant's Exhibit AA-245, introduced in evidence (p. 10,955). This is entitled "Detail of Operating Expenses other than Production, 1909 to 1918," and is a transcript made by the statisticians of the Public Service Commission from
1667 the annual reports of the respondent company. A comparison shows that in some cases the company kept the account described by the uniform system of accounts, but that its total for this account on the books would not in any year correspond with the amount shown in its report to the Public Service Commission. It also shows
1668 that in other cases it did not keep the account prescribed.

For instance, take the item under distribution—"Distribution supplies and expenses," which is account No. 633 in the uniform system of accounts, for the five years 1914 to 1918. The amounts under this account on the books of the
1669 company and in the reports of the Public Service Commission were as follows:

	"Distribution, Supplies and Expenses"				
	1914	1915	1916	1917	1918
Book Account, Exhibit AA-129	$67,467 42	$103,570 06	$98,974 89	$118,804 48	$100,458 06
P. S. C. Report, Exhibit AA-245	106,215 65	106,555 89	98,974 89	85,837 15	82,052 52

1670 The most frequent evidences of this failure to comply with the uniform system of accounts occur in the accounts under "General Expense" in the classification appearing on the report form of Public Service Commission.

As similar variations occur in all the years we will take as a sample certain of the accounts in 1909. 1671

GENERAL EXPENSES

	Report to P. S. C. Ex. AA-245	1909	Book Accounts Ex. AA-129	1909
833	Salaries and expenses of general officers	$124,406 24		
834	Salaries and expenses of general office clerks	132,051 51		
	Total	$256,457 75	Salaries, general office	$266,186 09
835	General office supplies and expenses	$27,664 37	General office supplies and expenses	$181,979 42
836	General law expense	127,617 22	Legal expenses	93,223 19
837	Miscellaneous general expense	168,170 44	Miscellaneous general expense	
851	Stable expenses	108,324 25	Stable expenses	86,188 13

1672

These give some of the instances in which the company has failed to comply with the requirements of the uniform system as to classification. However, this is the least important phase of its failure. 1673

The most important regulations contained in the Uniform System of Accounts for Gas Corporations, are those relating to property, particularly the fixed gas capital. The purpose of these regulations is to secure an accurate record of the *cash* cost of property actually used in the service of the public and of the amount of deterioration in such property from wear and tear, natural decay and other causes, and further to identify the amount expended with the property acquired. For this reason it is provided that replacements are not to be charged to expenses or any reserve accumulated from expenses, but are to be charged directly to the property accounts themselves. This procedure necessitates the prompt deduction from the property accounts of any property that ceases to be used — whether it is physically replaced or merely abandoned — 1674 1675

1676 because otherwise, the assets become inflated through the inclusion of replacements.

Section 20 of the orignal order of 1908 and section 15 of the modified order of 1917, contain the rule respecting such deductions for property retired. This important requirement has not been observed by the Consolidated Gas Co. The
1677 Company's own Exhibit 476, admits that its fixed capital account as of December 31, 1918, contained property costing $1,461,281.15, not used for gas purposes at that time and defendants' proof shows that additional property aggregating a much larger amount has ceased to be used or useful (see cross-examination of Carter,
1678 pp. 14582-14625).

The evidence is complete as to the company's failure, from 1909 to 1918, to comply with this important regulation.

The claim that property which is only temporarily disused need not be deducted from fixed capital account excuses the company's delin-
1679 quency is not sustained. By the modified order (Note A, section 15) the maximum period allowed for temporary disuse is two years, but even this liberal concession does not help the company, because practically all of the property excluded by appellants' witnesses has been out of service for more than two years.

1680 Just as the company has failed to make the required separation between gas and non-gas property in its asset accounts, so has it failed to make such separation in its expenses and taxes. Exhibit AA-256 (p. 18449), shows that until 1916 no separation whatever was made and the separation since then is partial and incomplete since

all taxes on real estate other than rented property are included in gas operating expenses even though such real estate (like the 44th Street property admitted in Exhibit 476, to be non-gas property) is not devoted to gas purposes. 1681

Upon any reasonable interpretation of sections 1-13 of Schedule B — Income Account; the books of a gas company should show *gas* operating revenues and expenses separately from other revenues and expenses. No such segregation appears on the books of the Consolidated Gas Co., and an accountant examining the books must follow his own judgment in selecting the accounts that pertain to the gas business. 1682

Considering the magnitude of the company's real estate interests outside of gas real estate, the company should have set up another group of operating accounts, co-ordinate with gas operations, and included therein the revenues and expenses from such "outside" operations. A partial observance of such requirement may be noted since 1916, but all of the general and overhead expenses like general officers' salaries are still charged to and reported under gas operations. With the exception of taxes on rented property practically nothing has been charged to the non-operating expense accounts provided in section 21 (p. 55). 1683 1684

The final question which comes up in the matter of the compliance of the respondent with the uniform system hinges upon section 14, page 34, which is as follows: 1685

"14. Operating Expenses Defined — By the operating expenses of a corporation are meant such expenses as are *necessary* to the

1686 maintenance of the corporate organization, the rendering of services required or authorized by law, the sale of merchandise, the production (including herein capital consumed) and disposition of the commodities produced, and to the collection of the revenues therefor."

1687 The kernel of the whole question is here. Even if the respondent had kept every account prescribed by the Public Service Commission, and in the manner prescribed and it was easy to ascertain from its books just what amounts fell under those accounts, still it would have fallen vitally short of the necessary proof of compliance with 1688 the uniform system. It has not proven that the expenditures which it claims "under operating expenses" are or have ever been "necessary" under the provisions of the section above quoted.

How important this phase of the question is may be judged from the amount of evidence taken upon the trial and the extent to which we have 1689 gone on this brief in discussing and considering this very question of the necessity of the various expenditures claimed by respondent company and carried in its operating accounts as operating expenses. For instance, the amount paid for oil, the amount paid for the general officers' salaries and the amount paid for taxes and set up for taxes, and the interest on unpaid taxes 1690 charged to the tax account, are a few of the items which we respectfully challenged below. In so far as the Court below has found that appellants have successfully challenged the necessity of respondent's expenditure he has found that respondent has charged

to its accounts upon its books, matters 1691
which are not "necessary" for the "production and disposition" of gas. In so far as it has included in its accounts items which the Court has found were not so "necessary," it must follow that in those respects at least, he has found that the books were not kept in accordance with the uniform system of accounts. Of course, 1692
we contend at length above, that there are other items which are without doubt not "necessary" for the production of gas, and in so far as our claims are sustained, it must be found that respondent has in those respects failed to conform to the uniform system.

1693

(b) *The Master's supposition that conformity with the uniform system of accounts would prove the accuracy of respondent's books and that failure of the Public Service Commission to enforce the law leaves a presumption that the law has been complied with is almost too absurd to refute.* 1694

There are under the jurisdiction of the Public Service Commission of the First District, some forty large public utility corporations, all of them keeping complicated accounts, going back into the realm of accounting chaos that accompanied the frantic speculation in public utility securities during the last half of the 19th century. 1695

To say, as the Master has, that the Public Service Commission should have a staff sufficient to see to it that each one of these great corporations keeps its books in such a way as to accurately indicate its operations, is amazing. The Public Service Commission can prescribe

forms of account. It can to the extent of its appropriations, endeavor to see to it that these accounts are kept by the numerous companies. Even as to that, the failure of a company to keep accounts in the form prescribed would not be excused by the fact that the Public Service Commission had failed to succeed in any of the penalty provisions of the Public Service Commission Law or the District Attorney had failed to put anyone in jail under the criminal provisions of the law. Corporations do not become innocent because they are not punished for disregard of the law.

But beyond the manner or the form in which the books are to be kept, is the matter of the substance appearing in the books, and as the Master says himself to Mr. Teele:

> "* * * Mr. Teele, will the finest set of books in the world, the most wonderfully designed set of books in the world, be of any use, unless the entries are properly made!
>
> The Witness: They will not.
>
> The Master: So that all you or any other expert could say was that these books are designed to create an accurate record, if the entries are properly made!
>
> The Witness: Quite right" (pp. 2030-2031).

The question of the accuracy of the books as well as the question of the necessity of the payments recorded therein depends upon multitudinous matters which could not by any human possibility be checked by a regulating body. The honesty and accuracy of every clerk who makes an entry in any book will effect the total result.

Can it be expected that the Public Service Commission must at its peril have an inspector at the elbow of every bookkeeper in every public utility in this great city to see that every entry he makes is accurately made? Can it be expected that the Public Service Commission must have sufficient men continuously working with the public utility companies to see that the original entries made are carried forward accurately in their many subsequent entries until they reach their final resting place in the general books of account? A mere statement of the proposition indicates how absurd is the Master's supposition. 1701 1702

POINT XVII

The Master erred repeatedly in the admission and exclusion of evidence, which errors were not corrected in the Court below. 1703

It will be quite impossible for the appellants to point out all of the errors committed by the Master in the admission and exclusion of evidence, but we shall confine our remarks under this head to the most important ones. 1704

The court below apparently gave little attention to these errors. They were not even discussed by him in his opinion. It was probably his intention to pass all of them along to this court for disposal.

(1) *Refusal to admit in evidence the general profit and loss account from December 31, 1905, to December 31, 1918, inclusive, of respondent company.* 1705

The appellants, at a very great expense, prepared certain tables made from respondent's

1706 books. All of these tables bore upon the question of the cost of making and producing gas as shown by respondent's books. Among these tables was one carefully prepared by Charles Frank, statistician, Public Service Commission, First District, for the appellants entitled "Consolidated Gas Company, General profit and loss account, De-
1707 cember 31, 1905, to December 31, 1918" (p. 10396, fol. 31188, marked Appellant's Ex. AA127, at p. 10399, fol. 31197 for identification). Mr. Frank testified it had been checked and it was a correct transcript of the figures in the books of the company. It was thereupon offered in evidence, the Master ruled it out on the ground that it con-
1708 tained revenues from sources other than the gas business (p. 10398, fols. 31191–31193). The Master's attention was called to the fact that the schedules that respondent had offered in evidence contained non-operating revenues (pp. 10398–10399, fols. 31193-31197). Still he refused to take the table.

1709 (2) *Refusal to admit in evidence the comparative balance sheet of respondent from December 31, 1905, to December 31, 1918.*

This table, prepared by Dr. Weber, chief statistician of the Public Service Commission, showed the assets and liabilities of the respondent for
1710 each of these years.

Although no objection was made to it, the Master refused to allow the witness to say whether it was made under his direction (p. 10955, fols. 32863–32864). Dr. Weber testified that the schedules included respondent's assets and its liabilities, and the Master manifested a most peculiar

attitude when the appellants were endeavoring 1711
to show that this exhibit was correct and had been carefully prepared; in fact, the preliminary questions relating to this document were ruled out by the Master, although no objection was made by respondent's counsel. It was finally offered in evidence, and all that the Master would receive of it was the first sheet, which contained gas capital only (pp. 10990–10991, fols. 32870-32871). 1712
32871).

It is obvious that the Master erred in excluding both of these tabulations, for, in the first place, he allowed respondent to offer in evidence tabulations made from the books which contained revenue other than gas business (see Mr. Teele's Exs. 205 and 355). And, in the second place, it 1713
was very important that the appellants be permitted to show all of the sources of respondent's income, both from the gas and non-gas business, as did Mr. Teele, and then eliminate those that were non-gas.

Furthermore, in view of the fact that this lighting monopoly controls both the electric and gas 1714
business of the greatest city in the world, it was highly essential to ascertain the comparative revenues of the two industries, so that there might be some basis of judgment as to whether the gas business was sacrificed to the electric business.

1715

(3) *The Master refused to allow the appellants to offer in evidence what is known as the Marwick-Mitchell & Company Report. This was an exhibit in the prior suit.*

Mr. Edgerton was called to the stand and testified that this report was gotten up by the ac-

1716 countant firm of Marwick-Mitchell & Company, and it was offered in evidence in the prior suit (p. 11048, fol. 33142). It was a tabulation of the cost of certain property of respondent. Mr. Edgerton checked the report with the books (pp. 11049, 11051, fols. 31148, 33153).

Mr. Edgerton was asked this question:

1717 "Q. So every item in this book, this Marwick & Mitchell report, was checked some time or other by you with the books of the company that you had then and were working on?

Mr. Ransom: I object to that as incompetent. The witness has said no such thing, and he would not be qualified.

1718 The Master: Objection sustained.

Mr. Chambers: Why do you sustain that?

The Master: Because he didn't say it, and if he said it, I would not believe it—checked up every item in this report.

Mr. Chambers: Well, I think he did"
1719 (pp. 11052-11053, fols. 33156-33157).

Mr. Edgerton further testified that he participated in making the report (p. 11053, fol. 33159). It was thereupon offered in evidence, and the Master ruled it out (p. 11054, fols. 33162-33163).

The appellants thereupon offered separately so much of the report which deals with the real property and the real property schedule. The Master
1720 refused to take that (pp. 11055-11056, fols. 33167-33168).

The Master was thereupon asked to take just so much of it so the figures might be shown with-

out allowing it in, and this he declined to do, contrary we believe to Equity Rule 46 (pp. 11056–11057, fols. 33168–33169). 1721

Thereupon Mr. Chambers said:

"Mr. Chambers: I would like to get on the record the tables that are on page 3 of that real property schedule, so the Appellate Court, if it be material, may be able to see what it is. 1722

The Master: No, I won't take it. If I am wrong in my theory of this court the Appellate Court will have to send it back to some other Master.

Mr. Chambers: That is what I want to avoid if I can, because they will have the testimony before them" (p. 11057, fol. 33170). 1723

And again:

"The Master: If, in arriving at a conclusion, I have let in evidence that it not proper, or refused to take evidence that is proper, that is one of the misfortunes of the Gas Company. They will have to go through the trial and tribulations of a new lawsuit. If I think Judge Ransom is right when he makes an objection I can do no more than sustain the objection. The responsibility is not mine; it is his. 1724

* * * * * * *

The Master: I am assuming the accuracy of the figures, and I am assuming that those figures show what the constituent companies paid for the real estate, what it actually cost them, and I am ruling it out on the ground that I am not interested in it. 1725

Mr. Ransom: This report is very inaccurate.

1726 The Master: I don't care anything about that; you are pressing the objection on the ground of its immateriality" (pp. 11058–11059, fols. 33174–33176).

The appellants further offered separately so much of the record that shows the original cost of the real estate (pp. 11060–11062, fols. 33178–
1727 33186), and the Master sustained it on the ground it was immaterial (p. 11067, fol. 33201).

This report was a very important document and showed the cost of most of respondent's property prior to the consolidation in 1884 and down to about 1905. We have already called attention to the fact that the Master did not refuse it be-
1728 cause it had not been properly authenticated. He conceded all that by his ruling. He ruled it out solely on the ground that it was immaterial. It is quite difficult to understand his ruling when it appears that in this report is the cost to respondent of its property from 1884 to 1905, which was very material in the case. However,
1729 the Master erred not only in not taking the report, but also by his failure to comply with Rule 46 of the Equity Rules, which provides:

> "Rule 46. * * * When evidence is offered and excluded, and the party against whom the ruling is made excepts thereto at the time, the court shall take and report so much thereof, or make such a statement re-
1730 specting it, as will clearly show the character of the evidence, the form in which it was offered, the objection made, the ruling and the exception."

The appellants properly excepted to the ruling. But if the appellants had not, all adverse rulings

carried with them exceptons, even though none 1731
were taken (pp. 2275–2276).

(4) *Appellants were not permitted to bring out from the secretary of respondent company that he had received interest on the amount collected by respondent company in excess of the 80-cent rate, in the prior suit.* 1732

Bearing upon the question of working capital, it was important to find out whether respondent had used the money collected by it under the original statute, in excess of the 80-cent rate, without interest. It had a material bearing on the question of the amount of working capital, and with this end in view Mr. Carter was called to the 1733
stand in order that the appellants might ascertain what was the fact concerning the payment of interest on this fund. It will be recalled this fund amounted in the aggregate to $6,936,175.20, being the amount paid to consumers by respondent in excess of the 80-cent rate, 1906 to 1908. The amount repaid by it to the con- 1734
sumers as of December 31, 1918, amounted to $6,285,917.58, and there was a balance on that date of $497,327.75, and the balance at the time of the trial was $430,692.63 (pp. 2943–2945, fols. 8827–8835). If the company had had the use of this money during all of these years, as it did have apparently, without interest, as we say, it 1735
had an important bearing upon the question of working capital, which was one of the important issues litigated in the case. The Master shut off all inquiry on this line, and positively refused to allow the appellants to show whether the Consolidated Gas Company obtained from Mr. Shields, United States Commissioner who had possession

of the money, interest, or whether it paid any interest to its consumers. We submit that this was reversible error (pp. 11483–11484, fols. 34447–34452). During the argument on the motion to confirm the Master's report, Mr. Chambers said:

"* * * we tried to find out whether the company had obtained interest on that fund or not, but the Master would not allow us to show that * * * The Master shut out that line entirely; it seems to me that was error.

The Court: It was error in so far as it affected what they actually got.

Mr. Chambers: Somebody no doubt acquired the interest on that. That fund ought to be drawing interest. It is about half a million dollars.

The Court: I would rather like to know that myself.

Mr. Chambers: He shuts us out.

The Court: I do not know that it has much to do with this case, but I would like to know about it.

Mr. Chambers: On the question of working capital it did have" (p. 202, argument before Hand, J.).

(5) It was error for the Master to exclude the tables prepared by Dr. Weber, Chief Statistician of the Public Service Commission, called by the appellants, showing the sources of the fund invested in property and in securities owned by the Consolidated Gas Company December 31, 1918.

Dr. Weber testified that he prepared this table personally and its sources came from the balance

sheet in the annual report of the respondent to the Public Service Commission (p. 11497, fols. 34490–34491). 1741

It was manifestly competent evidence and should not have been excluded, and the exception taken was good (pp. 11498–11505, fols. 34493–34515).

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(6) *It was error for the Master to admit in evidence "every voucher, every bill, every record, every paper, every report, which is reflected in these books"* (p. 3571).

In the first place respondent never offered the vouchers, bills, records, papers and reports above 1743 mentioned in evidence.

In the second place, if they had been offered, they were not identified, their correctness was not proven and no witness was called to testify concerning them.

A few vouchers were offered in evidence by the appellants. Aside from that no one knows to 1744 this day what particular records, vouchers and papers the Master spoke of when he made the extraordinary ruling to which we refer below. The record is very confusing concerning these vouchers. He said:

"I have just explained that when I received these books in evidence, I received in 1745 evidence practically all the supporting vouchers because they are all at your disposal. My attitude is that every voucher, every bill, every record, every paper, every report which is reflected in these books, is in this record" (p. 3571, fols. 10711–10712).

1746 A little later the Master seems to have expressed considerable doubt himself whether these vouchers, etc., were in evidence. The following took place:

> "The Master: If those vouchers are in evidence.
>
> Mr. Ransom: I thought you had ruled that
1747 they are!
>
> The Master: I have refrained from ruling that they are in evidence. I have said that they are in the record. I draw a distinction between saying that they are in evidence and being in the record" (p. 3855, fol. 11564).

1748 Then the Master ruled these vouchers, etc., in again.

We again quote from the record:

> "The Master: In that connection, I want to say and in answer to Mr. Chambers, that in my opinion all of the supporting vouchers in the files of the Consolidated Gas Company having any relation or reference to any of
1749 the entries in the books of account accessible to these defendants are as much in evidence as though they had been offered here and marked in evidence" (p. 3865, fol. 11594).

Thus, the Master ruled in evidence thousands of records, vouchers and papers which were not only not offered, but which were never produced,
1750 and there is no telling whether they were really in existence or not.

The appellants not only excepted to the ruling in this regard, but also made an appropriate motion to strike them out (pp. 15397–15404, fols. 46191–46212).

These vouchers were all subject to the same infirmities that we have urged concerning the books 1751
of account and Mr. Teele's schedules, and in addition they were improperly admitted because they were not offered, were not identified and no witness called to prove that they were correct. Thus, the appellants were deprived absolutely of the right to cross-examine any person concerning them, and the error was most harmful. 1752

(7) The Master improperly admitted in evidence Respondent's Exhibits 205, 355, 364, 365, 366, 367, 368, 382 and 389.

These exhibits are tabulations made by witness Teele and purport to have been made from re- 1753
spondent's books.

If the appellants are right in their contention that the books were improperly admitted in evidence, then, of course, these schedules should have been excluded. Consequently, whatever we have said in regard to the books we say in regard to the schedules; but, in addition to that, the 1754
schedules were improperly admitted for additional reasons, for instance, schedules 14a, 14b, 14c of Exhibit 205 were certain tax adjustments made by witness Teele and he admitted he procured an item of $14,281,563.36 from the returns made by the company to the State Board of Tax Commissioners, although these returns were not in evidence. Consequently, he did not base these 1755
three schedules upon the books of the company, but based them upon reports to the Tax Commissioners which were not in evidence and were never offered or introduced in evidence (pp. 3082, 3083; fols. 9214, 9225, 9245).

1756 We quote from the testimony of witness Teele:

"A. The figures that I am giving you here are the figures taken from the company's gross earnings report.

Q. Filed with the State Tax Commissioner?

A. The State Tax Commissioner. It is
1757 based upon the twelve months ending October 31, 1918.

Q. So really the basis of this figure of $38,797,04 so far as it relates to bond income finds its genesis in the report made by the Consolidated Company to the State Board of Tax Commissioners, upon which the State
1758 Board computed the gross income?

A. Yes.

Q. Then I would not find that detail in the company's books here?

A. Which detail? The detail of the tax or the detail of the basis of the tax?

Q. No, the detail of the basis of the tax.

A. You would find ten months of it. You would find the income from January 1st to
1759 October 31, 1918. The months of November and December, 1917, which are included in the return you would find in the 1917 books, not in the 1918.

Q. 'Sales less uncollected bills and allowances': Where did you get that from, that amount, that being a little item of $14,281,563,36 — just a bagatelle?

1760 A. All these figures are taken from the return made by the company to the State Tax Board.

Q. So that has its basis entirely in that return?

A. Absolutely" (pp. 3082–3083, fols. 9245–9248).

The appellants made a motion to strike out these schedules (pp. 15414, 15435–15436; fols. 46240–46242, 46306) but it was not granted. 1761

Furthermore, witness Teele, in preparing Exhibit 205, not only used tax vouchers and data of other companies which are not in evidence, but in many instances he used the oral statements made to him by Alrich and Woods, which statements were never sworn to by them (pp. 2720, 2726, 2735–2736, 3195; fols. 8160, 8178, 8204–8206, 9584). 1762

Exhibit 355 was a tabulation of revenues and expense of gas business of respondent for eight months ending August 31, 1919, by witness Teele. Of course, this is subject to the same infirmities as the books. In this exhibit Teele did not get all of his information from the books, but used the same method he used in getting up Exhibit 205, and he made a great many adjustments of taxes and other matters between gas and non-gas and used his own judgment and discretion in regard thereto. 1763

Exhibits 364, 365, 366, 367, 368, 382 and 389 are all subject to the same objections which were pointed out in regard to 355. 1764

(8) Other errors committed by the Master in the admission and exclusion of evidence.

While the appellants were presenting their side of the case, the Master refused to allow witness Frank, who had made an examination of the books, to testify in regard to gas stove sales income, and said: 1765

> "The same ruling as to all these questions, except where the witness will state under oath that Mr. Teele's figures were wrong" (p. 10734, fol. 32200).

1766 The Master refused to allow witness Boylan's testimony to be taken in regard to the necessary space or the space needed by respondent in the 57th Street office building (pp. 13546–13563, fols. 40637–40688).

The Master refused to allow witness Bemis to testify as to the return on investment in the Astoria property (p. 12994, fol. 38980).

1767 The Master refused the testimony of Dr. Bemis upon his opinion as to candle power (p. 13000, fol. 39000).

The Master would not admit in evidence the contract between Seaboard By-Products Coke Company with the Public Service Gas Company

1768 of New Jersey in regard to price of coke oven gas (pp. 11621–11622, fols. 34862–34866).

The Master would not admit in evidence the contract between H. Kopper and the Public Service Gas Company of New Jersey regarding coke gas (pp. 11789–11791, fols. 35365–35373).

The Master would not permit witness Birdsley

1769 to testify why he used 12 candles to the pound in making tests as to candle power (p. 12823, fol. 38468).

The tables showing occupancy of the floor areas in the general office building were improperly admitted for the reason that the witness Stark who identified the tables, obtained his information from hearsay sources (pp. 2819–2820, fols. 8455,

1770 8459).

The Master, at the time these papers were offered in evidence, asked the witness:

> "The Master: So that your apportionment is made upon statements made to the company by these other companies?
>
> The Witness: That is correct.

The Master: On that basis, and solely upon this hearsay statement of the other companies you can read off what your figure is the quota of restaurant space for each of these companies and is included in its rent, the quota of restaurant space charged to these various companies" (p. 2814, fols. 8441–8442). 1771

1772

The Master erred in admitting in evidence Exhibits 283, 284, 285, 286, 287 and 288. These were tabulations of certain documents and papers which were not in evidence (pp. 3528, 3651, 3653 and 3656, 15416).

Exhibits 290, 294, 303, 304, 317, were all improperly admitted because they were not proven (pp. 3800, 3812, 3830, 3831, 3850; fols. 46251–46253). 1773

Exhibits 319–326 were improperly admitted in evidence because they were tabulations showing delivery of oils from 1913–1918, and the contracts were not put in evidence (pp. 3873–3875).

Exhibits 327–331, 332–335, 337, were improperly admitted, for they were not properly proven (pp. 3874–3887). 1774

Exhibit 338 was improperly admitted in evidence. This was a produce exchange inspectors' report, and neither the inspector nor anybody else was called to prove that the report was accurate (p. 4005).

Respondent's Exhibits 340 and 341, 342, 343, 346 and 347, were not properly proven and should have been excluded (pp. 4354–4356, 4501–4504, 4518). 1775

Respondent's Exhibit 350, being a summary from the testimony as to the facilities of respond-

1776 ent, used jointly with the other companies, the Master announced he would not take it as to the value of the property (p. 4629, fol. 13886), yet when a motion was made to strike it out, said he thought it should go out but did not grant the motion (p. 15421, fols. 46262–46263).

Exhibit 401 purporting to show the details of
1777 accounts receivable in the gas business as of December 31, 1918, was not properly admitted and should not have been received (p. 8394).

Respondent's Exhibit 407, purporting to be a statement of operations and finances of the National Coal & Coke Co., should have been excluded, since the books, papers, vouchers and
1778 documents upon which it was based were never offered in evidence or received in evidence (p. 8772).

Exhibits 408-409 were made up from records not in evidence (pp. 8803–8804), and should have been excluded for that reason.

These are not all the many instances of im-
1779 proper admission of testimony. The scope of this brief will not allow us to complete the list. We contend that these were all reversible errors.

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POINT XVIII.

For the reasons assigned in the foregoing points the decrees appealed from should be reversed and the bill of complaint dismissed, with costs.

Dated, New York, October 10, 1921.

CHARLES D. NEWTON,
Attorney-General of the State of New York, Capitol, Albany, N. Y.

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WILBER W. CHAMBERS,
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CLARENCE R. CUMMINGS,
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Of Counsel.

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APPENDIX A.

Use of Space in General Office Building Assigned and Charged to Respondent.

Exhibit 186 (p. 16335) shows that the Consolidated Gas Company claims to use parts of the
1787 basement, first, second, third, fourth, fifth, twelfth, thirteenth, fourteenth, sixteenth, seventeenth and eighteenth floors and part of the restaurant floor, but on practically every one of these floors some or all of the space is actually used jointly.

Basement: Here there is a large vestibule (pp. 1228-1231) used jointly, and considerable space
1788 given up to the storage of appliances. In connection with the appliance space on this and other floors, Mr. Stark testified (p. 1364, fol. 4091), that while the subsidiary companies have display rooms for appliances, they have no storage rooms, and it is an inevitable conclusion that the Consolidated Gas Company stores all appliances for
1789 all companies. This is confirmed by the fact that such a large amount of space on all floors is used for the storage of appliances and by the further fact that when 20,000 sq. ft. of space was given up on January 1, 1919, it is claimed thereafter to have been used for the storage of appliances by the complainant company (p. 2822, fol. 8464) (about 3,400 sq. ft. jointly used).

1790 *Second Floor:* It appears (p. 1236, fol. 3706) that about one-third of the space claimed to be occupied, is used as a "recreation room or meeting room for Boy Scouts" (440 sq. ft.).

Third Floor: A large part of the space on this floor is used for the storage of appliances (p. 1264, fol. 3792) (4832 sq. ft.).

Fourth Floor: All of the space claimed on this floor is used for the storage of appliances (p. 1275, fol. 3823) (1,270 sq. ft.). 1791

Fifth Floor: All of the space claimed on this floor is used for the storage of appliances (p. 1275, fol. 3824) (3,575 sq. ft.).

Sixth Floor: On this floor is the space used for a large telephone exchange for all the companies in the building. The rental for this space is divided among the tenants of the building on the basis of the number of telephone extensions used by each (pp. 2808-2809, fols. 8424-8425). As to Stark's testimony on this, the only testimony offered, the Master said (pp. 2810-2811, fols. 8430-8431) "* * * he undertakes to apportion to these tenants the portion of telephone space. He testifies that the company has adopted a practice of charging with reference to the number of extensions used or instruments. * * * I am not at all prepared to say that that is the proper basis of apportionment." 1792 1793

Twelfth Floor: Part of the space on this floor is used for the Mutual Aid Society (p. 1284, fol. 3851) (4,700 sq. ft.), a large part of it is used for the Utilization Department (pp. 1285-1286, fols. 3849-3858), which works for all the companies, part is used for the Laboratory (p. 1294) (640 sq. ft), which does work for all the companies, part is used by the Society of Gas Engineers (344 sq. ft.) and part by the Pay Roll Department (p. 1285, fol. 3854) (2,000 sq. ft.), which pays men who work for other companies (3,800 sq. ft.); part by the Department of Claims and Arrears (p. 1286, fol. 3857) (1,040 sq. ft.), which collects bills for all companies, the basis 1794 1795

of payment being the amount of time spent by collectors in that department (pp. 6128-6129, fols. 18384-18387) and no allowance, so far as the record shows, being made for rent. Total 8,300 sq. ft.

Thirteenth Floor: Practically all of this floor is common to all of the occupants of the building. The only working department on the floor is the Treasurer's Department (p. 1308) which occupies a small space (18 x 70, p. 1309), but this department must in the nature of the case work for all the companies. The rest of the floor is occupied by the auditorium, a large women's rest room (p. 1214, fol. 3642), two bedrooms (p. 1220, fol. 3659) and a Red Cross Room (p. 1302) and a large school room and lounge rooms (pp. 1222-1223) (school room 64 x 84, 5,376 sq. ft.) (p. 1222, fol. 3665) (rest room, 1,700 sq. ft.), (Red Cross room, 3,000 sq. ft.) (Treasurer's Dept., 1,260 sq. ft.) (Auditorium, 2,812 sq. ft.). Total, 14,100 sq. ft. (pp. 1212, 1301-1309, fols. 3635, 3901-3925).

As to the use of the Auditorium: Mr. Stark testified (p. 1175, fol. 3523):

> "A. The lease to each tenant contains a clause that they shall have the use of the elevator service in the building and other things and the use of the auditorium when requested."

He further testified: "There were about 300 meetings held in the auditorium during the year 1918" (p. 1176, fol. 3526); that "the Annual Meeting of the stockholders of the company is held there" (p. 1176, fol. 3527); that "The Society of Gas Engineering, an organization whose membership is made up of employees of the Consolidated

Company and * * * all the other affiliated gas companies * * * hold 10 or 12 regular meetings during the year " (pp. 1176-1177); that the heads of department of the Consolidated and of the affiliated companies hold frequent meetings there (pp. 1178-1179); that the meetings of the Society of Gas Engineering are held at night, no charge of any kind is made and that after these meetings they have a dinner (p. 1202); that the Utilization Department carries on an educational course of the employees of that department (p. 1179, fol. 3536). 1801 1802

Fourteenth Floor: The only space claimed on this floor is the auditorium (p. 1309) (2,812 sq. ft.).

Sixteenth Floor: This floor is entirely given up to the general offices of the company (pp. 1310-1324). There can be no question that a portion of the time of every person on this floor is occupied in the affairs of companies other than the Consolidated Gas Company. (12,783 sq. ft.) 1803

Seventeenth Floor: This floor is also given up to people who work for all of the companies and as to many of whom there is not even an attempt by the respondent company to charge a portion of their salaries, let alone any of the space occupied by them, to the outside companies for whom they work. On this floor are the engineers, the chief chemist, the department of mains and services, and the department charged with operating this building (pp. 1324-1342) (13,374 sq. ft.). 1804 1805

Eighteenth Floor: This is given up mainly to the drafting room (pp. 1343-1348) and there is no indication in the record that any part of the rent for this space is charged to other companies, al-

1806 though a great deal of drafting is done in the room for all of the companies in the system (p. 1545, fol. 4034). A small space is used for the supervisor of the building and for storing furniture (14,000 sq. ft.).

The top floor, pent-house on roof, is occupied by the restaurant. As to the use of this restau-
1807 rant, Stark testified, that the leases provide (fol. 8421, p. 2807), "The said landlord further agrees to allow the tenant the use of the private elevator, dining room, rest room, barber shop, library and emergency hospital and other facilities under such restrictions and rules as may be made by the landlord for the proper operation of the build-
1808 ing."

The space is allocated to the various companies for rental purposes on the basis of the number of their employees (p. 2805, fol. 8414). No competent evidence was produced as to the number of employees of the various companies. Stark was the only witness as to this and as to his testimony
1809 the following colloquy occurred (p. 2814, fols 8440-8442):

"The Master: As I understand it, in the rental fixed for the various companies you have considered the proportionate part of the restaurant space as applicable to these various companies based upon the number of employees they said that they had?

1810 The Witness: That is correct.

The Master: So that your apportionment is made upon statements made to the company by these other companies?

The Witness: That is correct.

The Master: On that basis, and solely upon this *hearsay statement of the other companies*, you can read off what your figure is the quota of restaurant space for each of these companies and is included in its rent, the quota of restaurant space charged to these various companies." 1811

Moreover, it appeared (p. 2820, fol. 8460) that although the number of employees changes daily with each of these companies, the quota of restaurant space has not changed since January 1, 1918, and that it is impossible to tell over a period how many employees of the different companies eat there (pp. 2848-2849). 1812

It further appeared (p. 6089) that the restaurant is run at a loss and the losses charged up to the various companies on the same basis of number of employees. 1813

Summing the matter up then, the evidence upon which this tremendous claim for office space is based, is totally unsatisfactory.

Of the space, 100,000 feet, claimed to be used exclusively by the Consolidated, at least 80 per cent is either used by other parties entirely or is used jointly by all the companies. 1814

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APPENDIX B.

Miscellaneous General Expenses, 1918.

These include all of the expenses on page 28, Schedule 10 of Exhibit 205 (p. 16359) with the exception of "Defensive Emergency Service—$160,251.89" which the court has eliminated
1817 quite properly (p. 166a) and "United War Work Campaign, $31,250.00, which is not claimed by complainants, being deducted from expenses on Exhibit 205.

They are as follows:

Expenses — Notary Fees	$320.06
Expenses — Rewards	1,388.00
1818 Miscellaneous	27,280.85
News Service	4,389.67
Publicity Expense	10,060.57
Meetings, Fees	13,941.12
Engineers' Society	1,232.22
Illuminating Engineering Society	155.00
Gas Accountants' Society	804.31
1819 Other Societies	844.39
Supervision of Electrical Apparatus	2,473.75
Donations	55.00
	$62,944.94

All of these items we seriously question either as not applicable to the gas business or not proven
1820 or both.

(a) Miscellaneous.

This item amounting to $27,280.85 includes a great variety of expenditures, none of which were proven to be necessary for the gas business of the respondent company.

Dr. Weber gave a summary of the items over 1821
$500, on cross examination as follows (pp. 13782 to 13784):

The Witness: Did I give the first one, Eleven Annual Membership Dues, $50, in the Merchants Association of New York, total $559? United Electric Light & Power Company, $384.10. The voucher is not pro- 1822
duced for that. Postage for Annual Reports and Dividend Notices, $635. 8,000 copies of Annual Report — I think I read that $675.25. Services and Disbursements of E. J. Kenney and assistants in January, $727.91. In February, the same, $803. Among the April charges, Kenney again, $788.15. Sherman & Sterling, for Sundry Disbursements, in various amounts and proceedings, including 1823
West 44th Street condemnation matters, $934.78. In that month of July, services and disbursements, Kenney, $844.07, and the second item of $769. In August, 1,000 tickets for Police Field Day, $1,000, and 250 tickets, same thing, $250. J. W. Lieb, contribution towards year's expense of National Committee on Public Utilities, $2,000. Services 1824
and disbursements, E. J. Kenney, $838.05. In October, Kenney, another voucher, $774.62. Mercantile Safe Deposit Company, annual payment for use of safe, $300. That was the item you asked about.

Q. Yes. A. $300.

Q. Do you find an item for Auditing Books of Account?

1825

The Master: Well, he has not reached it yet.

Mr. Clark: Wait a minute.

A. December, Kenney, $933.29. Expenses of Boy Scout Movement, $516.65. Another voucher for New York Edison Company for

1826 expenses of Mr. Kenney, $1,309.80. I think I read that. Charles S. McCullough, examining books 1917 and making report, $1,200. I think I read all of the items of $500 or over that are in the account."

He here accounts for over $18,000, $9,000 of which consist of payments to Kenney of the New
1827 York Edison Company, plainly for work similar to the items carried under "Defensive Emergency Service," which has been eliminated by the court below (p. 166a).

The remaining items, some like the contribution to Boy Scouts, are entirely extraneous to the gas business, while all are distinctly for the benefit of
1828 the system as a whole, and the part really applicable to the gas business, if anything, is not ascertainable. All of the vouchers under this heading for the year were put in evidence under Defendants' Exhibit No. 405 (p. 18717). Some expenditure vouchers were entirely lacking. Most vouchers lack any information on their face as
1829 to the nature of the services rendered or materials furnished. All fail to establish the necessity of the payments they represent in the gas business of respondent.

(b) News Service.

This small item of $4,389.67, as to which all the vouchers were introduced under Ex. No. AA-405
1830 consists of charges which seem to be mainly in connection with following rate litigation and other matters affecting public utilities throughout the country.

About half of the amount is paid to the "General Shorthand Reporter Company" for "copies of testimony in P. S. C. cases."

Other items included are as follows: 1831

Name	Voucher No.	Purposes	Amount
Lawyers' Cooperative Publishing Co	1256	Public Utility reports, 1915–17 copies of D. & E.	
C. G. Burgoyne	3467	Texas Midland R. R. 550 copies memorandum on depreciation	$50 00
N. F. Towner	5640	Memorandum Brooklyn Borough Gas Co. v. P. S. C.	247 75
Real Notice Corp	4284	To service from April, 1918 to 1919	299 25
Albany Reporting Co	4398	For furnishing legislative information for session of 1918	300 00
Clarence Burgoyne	12702	Two copies of testimony in Kings Co. Lighting Co. v. Lewis, et al	250 00
			373 60 1832

It is apparent that this expenditure was made for the purpose of gathering together data for use in litigations such as this. If there was any benefit derivable at all, it should be borne by the entire system.

(c) *Publicity Expense.*

This item of $10,060.57 is made up mainly of 1833 the services and expenses of R. E. Livingston, the respondent's publicity agent. About twice this amount is paid by respondent, the remainder not appearing here being charged out to other companies. All of the vouchers are in evidence under Exhibit AA-405.

Some of the typical Livingston items are as 1834 follows:

Name	Voucher No.	Purposes	Amount
R. E. Livingston	289	Transcript of testimony, $144.50; Merchants Association of New York, dues, $50; Real Estate Board of New York, dues, $25; miscellaneous, $300.13	$519 63
R. E. Livingston	893	For services to January 31, 18—, $791.66; miscellaneous, $121.60	913 26
R. E. Livingston	1941	Copies of stenographic records, $75; incidentals, $20; remainder miscellaneous	354 84
R. E. Livingston	3350	Copies of bills, etc., $350; incidentals, $18; remainder miscellaneous	425 50 1835
R. E. Livingston	6335	Copies of hearing, $260.88; Harlem Board of Commerce, dues, $10; newspapers, $9.32; remainder miscellaneous items	483 58
R. E. Livingston	8905	Copies of Public Service Commission cases, $125; New York Telephone Company, $31.07; incidentals, $32; remainder miscellaneous	381 65
R. E. Livingston	10880	Miscellaneous items of which no details are given	131 87
R. E. Livingston	11152	Miscellaneous items of which no details are given	159 87

1836 In practically every one of these Livingston vouchers appears the unexplained item, "Incidentals," in amount from $10 to $30.

Mr. Livingston testified (pp. 10767-10804, fols. 32411 to 33301) that he received a salary of $12,000 per year (p. 10775, fol. 32323); that he rendered monthly statements to the Consolidated
1837 Gas Company for his expenses, attaching thereto vouchers for payments made by him; that these vouchers were returned to him with a check for the amount claimed (pp. 10768-10770, fols. 32363-32310); he then testified as follows (fols. 32310-32312, pp. 10770 to 10771):

"Q. Have you the original bills in connec-
1838 tion with each one of these vouchers? A. No, sir.

Q. Where are they? A. Destroyed.

Q. When were they destroyed? A. Well, I presume as soon as that comes back. I suppose I have been destroying them every week for the last fifteen years.

Q. You have been destroying these bills?
1839 A. Yes, sir.

Q. These evidences of disbursements made by you every week for the last fifteen years? A. I should say I have.

Q. Then, as I take it, when they come back to you and you get the check, you get this voucher back and you then each week destroy —— A. I do not get that voucher back.

Q. What? A. I do not get that voucher
1840 back; I get the check.

Q. You get the check back with the original bills? A. Yes, sir.

Q. Then it is your custom each week to destroy the bills and the original data of the week before? A. Yes, sir.

Q. And that has been done uniformly for the last fifteen years? A. Yes, sir."

He gave no explanation for the destruction of these evidences of payment, but the mere fact that they were destroyed is enough.

There are also numerous items under this heading for advertisements in the "Sun," the "Wall Street Journal," "Daily Financial America," "New York Times," "The Chief," "New York Commercial," "Civil Service Chronicle," "Journal of Commerce and Commercial Bulletin," totaling over $1,200.

What these advertisements were neither the record nor the vouchers disclose except in the case of Voucher 1927, which appears to be an advertisement in the "New York Sun" of the annual meeting of stockholders.

The entire basis of these expenditures is unsatisfactory and elusive.

(*d*) *Meetings, Fees,* $13,941.12.

The sums paid for these fees seem exorbitant and there is no indication as to what amount of these fees should properly be chargeable to gas operations. The other interests of this corporation, both gas and electric, are as great, if not greater, than those connected with its own gas business.

(*e*) *Engineering Societies.*

Three of these societies are itemized: "Engineers' Society, $1,232.22"; "Illuminating Engineering Society, $155," and "Gas Accountants' Society, $804.31." The rest is bulked under "Other Societies, $844.39."

The amounts involved are small, but the expenditures are such that they must be frowned upon. It was to these items among others, that the Master refers in his opinion at page 49:

"There are some items, too, like * * * enter-
1846 tainment expense, that are disputed."

The vouchers for all these societies are in evidence under Exhibit No. AA-405. Of the Engineers' Society, most vouchers are for "meals," "music," "cigarettes," "cigars," "flowers," "dinner service," "subscriptions to magazines." The only item apparently connected with gas en-
1847 gineering is Voucher 14456, October, for $65, to W. H. Fullweiler for "Lectures on Production of Toluol."

The expenses under "Gas Accountants' Society" are similarly for entertainment and meals, with the distinction that all of them are borne by the Consolidated.

1848 The expenses under "Other Societies" are mainly for dues to various societies, most of which seem to have little relation to the gas business. Some of them are as follows:

	Annuel Dues to American Peat Society	$5.00
	Illuminating Engineering Society,	
1849	½ dues	2.50
	½ dues National Commercial Gas Association	2.50
	Harlem Board of Commerce, dues.	10.00
	National Ass'n Corp. Schools	100.00
	Dues of W. B. Irwin, National Commercial Gas Association	10.00
	Dues of D. S. Hudson and R. A. Carter, Jr., in R. S. M. A	15.00
1850	Fifth Avenue Association, dues . . .	100.00
	Gramercy Neighborhood Ass'n	100.00
	Chamber of Commerce, dues	25.00

Numerous other vouchers are missing entirely and some are plainly for entertainment, such as "Dinner Service — Society of Gas Engineers, $20," and "Two guests for lunch, $1.50."

GENERAL AND MISCELLANEOUS EXPENSES, 1919. **1851**

The following vouchers were charged to Publicity Expense:

Date	Voucher No.	Exhibit No.	In favor of	Description		Amount	
	3366 (p. 19,226)	AA-478	Benj. H. Tyrell, Inc.	8,500 annual reports for stockholders		$835 00	
	8051 (p. 19,227)	AA-479	R. E. Livingston	June rent	$86 46		
				Stenographic copies of investigation	236 00		
				Postage stamps	10 00		
					40 00		**1852**
				Salaries	119 52		
						491 98	
	8724 (p. 19,228)	AA-480	R. E. Livingston	J. W. Harrington Cos. war history	$200 00		
				New York Telephone	15 15		
				Salaries and miscellaneous items	94 77		
						309 82	
July 31	11486 (p. 19,229)	AA-481	R. E. Livingston	Salary	$500 00		
				War history	100 00		
				State Dept. Inf. Co	50 00		
						650 0	
Sept. 30	14017 (p. 19,230)	AA-482	R. E. Livingston	Salaries copies of Public Service Commission hearings, E. D. Sullivan gas case statistics		333 95	**1853**

The following vouchers were charged to Miscellaneous General Expense:

	Voucher No.	Exhibit No.				
March	3669 (p. 19,231)	AA-483	Sherman & Sterling	Transcript of proceedings as per agreement, 5,000 pages, 12,500 folios (N. D.)	$1,875 00	
April	5383 (p. 19,231)	AA-484	Sherman & Sterling	Transcript of proceedings including night work and assistants as per agreement, $3,640.80; by payment, $1,875	1,765 80	**1854**
	8727 (p. 19,232)	AA-485	B. Moynahan	Transcript of closing addresses of counsel (pp. 9710-9918), Kings Co. Lighting Co.	78 00	

The following vouchers were charged to Gas Rate Appeal No. 2:

	Voucher No.	Exhibit No.				
July 2	9451 (p. 19,233)	AA-486	Sherman & Sterling	For various disbursements incurred in suits and proceeding, from January 1, 1919, to July 1, 1919	$264 14	**1855**
	5380 (p. 19,234)	AA-487	Patterson, Teele & Dennis	On account of professional services rendered since January 1, 1919, say	15,000 00	

(There is attached a note from the Asst. Sect. Office to J. H. N. Armstrong, Controller, stating that he charged to Gas rate appeal No. 2 and at the end of the case the expenses so shown should be prorated among the affiliated Cos.)

1856 The following vouchers were charged to Miscellaneous and General Expenses:

	Voucher No.	Exhibit No.			
	1774	AA-488	New York Edison	Expenses of Mr. Kenny in guarding plants — no details	$795 61
	3237	AA-489	New York Edison	Expenses of Mr. Kenny in guarding plants — no details	743 00
	4867	AA-490	New York Edison	Expenses of Mr. Kenny in guarding plants — no details	511 04
	6474	AA-491	New York Edison	Expenses of Mr. Kenny in guarding plants — no details	1,296 98
	7944	AA-492	New York Edison	Expenses of Mr. Kenny in guarding plants — no details	830 27
1857	10366	AA-493	New York Edison	Expenses of Mr. Kenny in guarding plants — no details	633 33
	11244	AA-494	New York Edison	Expenses of Mr. Kenny in guarding plants — no details	620 67
	13061	AA-495	New York Edison	Expenses of Mr. Kenny in guarding plants — no details	490 83
	14681	AA-496	New York Edison	Expenses of Mr. Kenny in guarding plants — no details	956 66

(pp. 19,235-19,271)

The following vouchers were charged to Miscellaneous General Expenses — Other Societies:

1858	Voucher No.	Exhibit No.			
	479		Merchants Association of New York	Voucher missing	$550 00
	2512	AA-497	American Gas Association Company	Membership dues for fiscal year ending September 30	2,977 49
	6556	AA-498	Fifth Avenue Association	Annual dues	100 00
	8726	AA-499	Broadway Association	Annual dues	100 00

(pp. 19,275-19,277)

The following vouchers were charged to Defensive Emergency Service:

1859	Voucher No.	Exhibit No.			
	825	AA-500	New York Telephone Co	Local service	$8 78
	2730	AA-501	New York Telephone Co	Local service	8 66
	2733	AA-502	Northern Union Gas Co	Miscellaneous supplies	8 00
	3143	AA-503	Northern Union Gas Co	Miscellaneous supplies	9 21
	4382	AA-504	Fowler Manufacturing Co	Missing	7
	5585	AA-505	Northern Union Gas Co	Fuel	2 82
	5629	AA-506	New York Telephone Co	Local calls	6 75
	9899	AA-507	New York Telephone Co	Local calls	3 34
	10338	AA-508	New York Telephone Co	Local calls	3 33
	12185	AA-509	New York Telephone Co	Local calls	3 33

(pp. 19,278-19,335)

1860 These vouchers were charged to Claims and Arrears Expense:

		Voucher No.	Exhibit No.			
Jan.	2	87	AA-510	Sherman & Sterling.	For three months' rent in advance for office at 55 Wall street	$1,875 00
April	1	6290	AA-511	Sherman & Sterling	For three months' rent in advance for office at 55 Wall street	1,875 00
July	1	9602	AA-512	Sherman & Sterling.	For three months' rent in advance for office at 55 Wall street	1,875 00

(pp. 19,337-19,338)

NOV 7 1921
WM. R. STANSBURY
CLERK

Supreme Court of the United States

October Term, 1921

Nos. 238, 288

CONSOLIDATED GAS COMPANY OF NEW YORK,
Complainant-Appellant,

against

CHARLES D. NEWTON, as Attorney-General of the State of New York, et al.,
Appellees.

BRIEF ON BEHALF OF APPELLEE NEWTON, AS ATTORNEY-GENERAL OF THE STATE OF NEW YORK AND APPELLEE SWANN, AS DISTRICT ATTORNEY OF NEW YORK COUNTY.

CHARLES D. NEWTON,
Attorney-General
of the State of New York,
Capitol, Albany, N. Y.

WILBER W. CHAMBERS,
CLARENCE R. CUMMINGS,
of Counsel.

WILBER W. CHAMBERS,
Solicitor for Appellee Newton,
Capitol, Albany, N. Y.

JOHN P. O'BRIEN,
Corporation Counsel,
Solicitor for Appellee Swann,
Municipal Building,
New York City.

JAMES A. DONNELLY,
HARRY HERTZOFF,
of Counsel.

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SUPREME COURT OF THE UNITED STATES

CONSOLIDATED GAS COMPANY OF NEW YORK,

Complainant-Appellant,

against

CHARLES D. NEWTON, as Attorney-General of the State of New York, et al.,

Appellees.

October Term, 1921. Nos. 258, 288.

Brief on behalf of Appellee Newton, as Attorney-General of the State of New York, and Appellee Swan, as District Attorney of New York County.

No. 258

No. 258 is an appeal by the above named Consolidated Gas Company of New York from certain portions of the amended final decree herein, entered in the office of the clerk of the United States District Court, for the Southern District of New York, on August 11, 1920 (pp. 128–133).

This court has now before it the main appeal by the appellees herein from the decree. (Case No. 257.) The instant appeal " raises only the question of the power of the court to include in the final decree the provisions of said paragraphs " (quoted below), and " the questions so raised being only questions of law, * * * " (p. 127).

The paragraphs complained of are as follows:

> "(6). Further ordered, adjudged and decreed on a condition of the continuance of the injunction hereinbefore granted, that

Note.—References are to record in No. 258 unless otherwise indicated.

until March first, 1921, or until the earlier promulgation of a gas-rate applicable to the plaintiff by some competent authority of the State of New York, the plaintiff shall neither charge nor collect for the sale of gas in the City of New York more than the sum of One Dollar and twenty cents per thousand cubic feet. And it is

"(7) Further ordered, adjudged and decreed as a further condition upon the continuance of said injunction that until March first, 1921, or until the earlier promulgation of such gas-rate by such authority the plaintiff shall on the fifteenth day of August, 1921, and on the fifteenth day of each succeeding month, pay to Richard Welling, Esq., (who is hereby appointed special master for that purpose) out of all moneys collected by it for sale of gas in the city of New York all sums in excess of eighty cents. And it is

"(8) Further ordered, adjudged and decreed that the said special master shall deposit all money so paid to him, equally in accounts in his name as special master in the New York Trust Company, The United States Mortgage & Trust Company, and the Title Guarantee & Trust Company at such interest as he can best obtain, to be withdrawn therefrom only upon order of this court.

"(9) Further ordered, adjudged and decreed that the said special master shall hold said moneys until March first, 1921, or until the earlier promulgation of such rate, as aforesaid, and upon the earlier promulgation of such rate the said special master shall on order distribute the moneys so collected with accrued interest, in accordance with such rate as though the same had been in effect

from the date of the entry of this decree; but if no such rate shall have been promulgated on or before March first, 1921, then he shall pay over the sums so collected with accrued interest to the plaintiff. The said said special master in either case to retain there from his expenses and allowance when fixed by the court. And it is

"(10). Further order, adjudged and decreed that instead of making any payment or part payment to said special master in cash hereinbefore required, the plaintiff may at its option deposit with said special master Liberty Bonds of the United States or any other bonds in which savings banks are authorized to invest under the laws of the State of New York of a market value at the time of such deposit equal to one hundred and three per cent. of the payment or part payment for which they are substituted; said bonds to be held by said special master subject to the provisions in this decree marked (9), both as to their principal and any interest accruing thereon during the period of his possession, said interest to be apportioned per diem. And whenever the market value (less subsequently accrued interest) of such bonds shall be more than the cash for which they are a substitute, the said special master is hereby directed to call upon the plaintiff to deposit with him additional bonds sufficient to make up one hundred and three per cent. of such cash, and such deposit shall be a condition upon the further continuance of this injunction. And it is

"(11) Further ordered, adjudged and decreed that the plaintiff may at any time withdraw on order any cash previously paid to the special master upon the deposit with said special master of such bonds to be held

by him under the same terms as are applicable to the deposit of bonds in place of any original payment. And it is

"(12) Further ordered, adjudged and decreed that instead of making any payment or part payment to said special master in cash hereinbefore required, the plaintiff may, at its option, file in court on order a surety bond in place of the same upon the following terms and conditions; All such bonds shall be executed by the plaintiff and by a surety company authorized to give bonds by the rules of this court. No surety company shall execute more than one bond and that in a sum no greater than $500,000. All bonds shall be conditioned in the payment of the sum in cash for which they are a substitute together with seven per cent. thereon until the time of payment. All such bonds shall be further conditioned upon the payment of the principal and interest thereof in accordance with the provisions of this decree, marked (9) or of any future modification thereof, and shall contain a provision that the same shall continue valid notwithstanding any future extension by decree of the period hereinbefore mentioned within which a new rate may be promulgated, and notwithstanding any further extension of payment resulting from any stay during the pendency of any appeal herein and another modification of this decree or of any stay in particular. Such bonds in the aggregate shall not at any time exceed two-thirds of the total payments then required by the terms of this decree. And it is

"(13) Further ordered, adjudged and decreed that the plaintiff may on order at any time withdraw any moneys previously paid to the special master upon filing any surety

bond drawn as hereinbefore described. And it is

"(14) Further ordered, adjudged and decreed that the foregoing provisions of this decree marked (9), (10), (11), (12) and (13) shall apply to all moneys collected by the plaintiff between July 1, 1920, and August 5, 1920, under the temporary injunction heretofore issued by the statutory court on June 28, 1920." (Pp. 123–124.)

The portions of the court's opinion which relates to the above provisions in the decree will be found at pages 112–114, 117–121 (case 258).

The learned judge states clearly the reason why the decree was drawn in the manner complained of. He says:

"Strictly the decree should merely enjoin the defendants from enforcing the statute and leave the plaintiff to fix such rates as it may choose, collecting them until the State takes some further action. That result I am unwilling to accept because it relieves the company from any regulation meanwhile and exposes the public to its estimate of what a fair rate should be." (Pp. 112–113.)

Thereupon the learned judge states:

"No one suggests that I have the power to fix a rate and obviously I have not; it is a prerogative of the Legislature, delegated usually to the Public Service Commmission. But as an injunction is discretionary it is possible to annex equitable conditions to it and this I should do." (P. 113.)

In his supplemental opinion he says:

"The second point urged is that I have exceeded my jurisdiction by imposing as a condition upon the continuance of the injune-

tion that the fund deposited as security shall be distributed retroactively in accordance with the new rate when promulgated." (P. 118.)

The judge further states:

"The plaintiff is not, however, absolutely entitled to an injunction, it is an equitable remedy, and may be refused except on equitable conditions." (P. 119.)

No. 288

No. 288 is an appeal by the Consolidated Gas Company of New York, from a decree of the United States District Court, for the Southern District of New York, entered February 28, 1921, modifying paragraphs "7" and "9" of the decree of August 4, 1920, as amended by the decree of August 11, 1920. (Decree appealed from is No. 258.)

The decree of August 11, 1920, provided that unless the Legislature fixed a rate on or before March 1, 1921, then complainant was to have the fund collected in excess of the statutory rate, in the hands of the Special Master.

The defendants, on February 15, 1921, moved on notice to have the decree of August 11, 1920, continued by taking out the limitation of March 1, 1921 (pp. 1 and 2 — record No. 288).

The court, upon this application, declined to continue the limitation of the rate of $1.20, and allowed complainant thereby to charge any rate it saw fit (pp. 62–64, record No. 288). The court, however, retained the provision which provided that the excess collected from consumers above the statutory rate, should be impounded and

should be distributed in accordance with any rate thereafter promulgated by the Legislature or other competent State authority, provided such rate was promulgated three months after the determination of the appeal taken by the defendants and which is now before this court (p. 64, record No. 288).

Complainant makes the following assignment of errors:

1. "The court erred in making that portion of said supplemental or amended final decree reading as follows:

'(7). Further ordered, adjudged and decreed, as a further condition upon the continuance of said injunction, that until three months after the determination of any appeal taken from this decree, or until an earlier promulgation of some gas rate, temporary or final, by competent state authority, the plaintiff shall on the fifteenth day of August, 1920, and on the fifteenth day of each succeeding month, pay to Richard Welling, Esq., (who is hereby appointed Special Master for that purpose) out of all moneys collected by it for sale of gas in the city of New York, all sums in excess of eighty cents.' and it is

2. The court erred in making that portion of said supplemental or amended final decree reading as follows:

'(9) Further ordered, adjudged and decreed, that the said Special Master shall hold all moneys so collected by him until the promulgation by competent State authority, of a definite or final rate, and shall on order thereupon distribute the same with accrued interest in accordance with such rate as though the same had been in effect from August 4, 1920. The plaintiff upon the applica-

> tion for such order may show cause why the said rate is not properly applicable over the whole or any part of the said period, and, if the court so find the said moneys shall be then distributed, as nearly as may equitably be done, in accordance with such rate, and especially with the principles and findings upon which it shall have been based. The Special Master shall retain his expenses and allowances out of said moneys when fixed by the court." (P. 65, record No. 288.)

Therefore, the only question presented upon both appeals is the power and propriety of the court in imposing the conditions above referred to. No other question is presented.

Complainant endeavored, however, upon the application in February, 1921, to inject into the matter certain affidavits relating to the alleged cost of making and producing gas in 1921.

The defendants disputed absolutely these figures by affidavits and showed that prices had sharply decreased since the decree of August 11, 1920 was made (pp. 31–41, record No. 288).

The court below very properly took the view that complainant had misconceived the issue before the court, saying:

> "The issue, as I have already said, is misconceived. Of course, I cannot at present undertake, especially on affidavits, to decide whether the plaintiff's claims are too high, nor would it be of service if I could. In that I should have to be guided substantially by what the plaintiff claims so long as it makes a prima facie case for its figures. The evidence is not sufficient to make any finding and this is in any event not the time to do so. Moreover, it has proved impossible to avoid

> the consequence that the limit, if fixed, shall be supposed to be a rate, and it would be unfortunate to give any color to the supposition that a rate of one dollar and forty-five cents had the approval of a court. Besides, the rights of the public are in any case protected if the plaintiff must eventually account for all sums collected. Finally, it must be conceded that since my decision there have been several rulings to the contrary and between us the Supreme Court alone can decide. If I set a limit and that court eventually decides that I had no such power, the damages will be finally consummated, but if it holds that I have power to distribute the fund according to the rate, the money will be at hand, and nothing will be lost to consumers except the temporary use of their money on which they are being secured their interest" (Pp. 61-62, record No. 288.)

We submit that it was quite improper on the part of the complainant in this ex-parte way to endeavor to get before the court certain figures relating to the alleged cost of making and distributing gas in 1920 and 1921, the court below was entirely right in disregarding it all and we urge that the same should be disregarded here; for, in the first place, the figures are nothing but the self-serving declarations on the part of the complainant; in the second place, the defendants have had no opportunity to examine the books of the company, cross-examine its witnesses and to cast out improper deductible items; and in the third place, the entire matter was immaterial upon such application, and it was for that reason that the defendants did not go into it further.

In the following points we contend that the

court not only had power to impose the conditions complained of, but that the propriety of doing so was properly exercised.

The court has allowed complainant to fix any rate it chooses, pending the appeal, subject only to the limitation that when competent authority prescribes a rate the moneys collected in excess of the statutory rate of 80 cents, shall be distributed to its consumers under direction of the court.

In the event the appeal taken by the defendants herein and the appellants in case No. 257 succeeds, then of course, this entire matter is academic; on the contrary, if the decree appealed from in that case should be affirmed, we submit that the moneys collected in excess of the statutory rate will be distributed in accordance with the judgment of this court. In the meantime, the consumers will have some protection.

POINT I

THE CONDITIONS IMPOSED BY THE COURT UPON GRANTING THE INJUNCTION WERE PROPER.

The conditions imposed by the decree of August 11, 1920, were (a) that complainant was prohibited from collecting more that $1.20 per M cubic feet for gas sold until March 1, 1921, or until the earlier promulgation of a gas rate applicable to appellant (removed by decree of Feb. 28, 1921; and (b) that the money in excess of the statutory rate be held by the special master appointed for that purpose until March 1, 1921, or until the earlier promulgation of a rate for gas, and when such a rate was promulgated the special master should distribute the money so collected,

with accrued interest, in accordance with such rate, as though the same had been in effect from the date of the entry of the decree; but if no such rate was promulgated then the special master was rquired to pay over the sums so collected, with accrued interest, to complainant. The date March 1, 1921, was extended to three months after the decision on the pending appeal in Case No. 257, by decree of February 28, 1921.

The rest of the provisions are not important and relate principally to the method of carrying out the provisions in the decree. For instance, complainant was required to deposit the money with the special master on the 15th of each month; the master was required to place the money on deposit with certain banks so that the same would draw interest; the master might pay over to the complainant certain portions of the money on receiving liberty bonds for same; and complainant was given leave to substitute bonds in place of cash with the master but no surety company was to execute more than one bond, and in a sum no greater than $500,000 (pp. 123–124, Record No. 258).

FIRST: The limitation of the amount that complainant might charge for gas.

As we have already shown, one of the principal conditions imposed by the decree of August 11, 1921, was that complainant might not charge more than $1.20 per M cubic feet for gas sold.

As Judge Hand said:

> "The first question is of an extension of the limit of one dollar and twenty cents. When this was set, all the data were taken

> from the evidence at the hearing, and the limit was based upon the utmost sum which it could be supposed that the plaintiff could be allowed to charge by the Public Service Commission when it acted. *At that time the plaintiff was apparently content with the limit* * * *." (p. 61, record 288.)

The statutory rate was 80 cents per M cubic feet and the court, by this provision in the decree, allowed complainant to collect 40 cents additional during the pendency of the appeal; in other words, allowed it to raise the rate 50 per cent. Complainant naturally wanted to fix its own rates unrestricted. The learned judge noted this and refused to allow it to go unregulated, and declined to expose the public to a rate which complainant might impose. It was perfectly proper to impose this condition for the court below was about to destroy the act of the Legislature in fixing the rate of 80 cents at a time when the Legislature was not in session (August, 1920), and without any other regulatory body in existence having authority to fix a rate.

The whole plan in regard to rates governing gas corporations was to compel them to sell gas at a rate fixed by the rate-making body. Naturally, complainant desired to get rid of this regulation, but it would have been unfair and unjust to the consumers to allow the company to go unregulated even for a short period. But in the decree of February 28, 1921, even this protection to the consumer was taken away.

As we shall see by the authorities referred to below, the court had the power to annex equitable conditions to its decree.

SECOND: Likewise, the retroactive provision of the decree was proper.

We have already alluded to the retroactive clause, which provides that as soon as a rate was fixed by the Legislature or other regulatory body, the money should be distributed in accordance therewith, and that such rate should be retroactive, and relate to the date of the decree when the 80 cent rate was destroyed.

In other words, the learned judge endeavored to surround his injunction with such conditions that complainant would at no time be free to impose its own rate without some restriction. He wanted to avoid a repetition of what happened prior to the time when these companies were free from legislative regulation concerning rates, the days spoken of by Mr. Justice Peckham in the prior suit when they made nearly as high as 25 per cent on the money actually paid in. (*Wilcox* v. *Consolidated Gas Co.*, 212 U. S. 19, p. 45.)

If the court were without the power to do this, then no condition could be enforced and the rate to be charged could not be limited in any way.

There is no question but that the court below had the power to impose such a condition and it is clear the circumstances here required the exercise of such judgment.

We submit that the power and propriety of imposing the conditions complained of are amply supported by the following and other authority.

As a general proposition a court of equity has sweeping powers in molding its remedies to meet conditions with which it has to deal.

In the case of *Graselli Chemical Co.* v. *Aetna*

Explosives Co., 252 Fed. Rep. 456, Circuit Court Judge Manton, writing for the court, said (p. 459):

> "A court of equity's modes of relief are not fixed and rigid. It can mold its remedies to meet the conditions with which it has to deal. The jurisdiction of equity is the whole domain of conscience, limited only by legislative enactment."

In the case of *Municipal Gas Company of Albany* v. *Public Service Commission*, 225 N. Y. 89, p. 103, it was stated:

> "The court may mould the decree in furtherance of justice. If it grants an injunction, it may limit the term of restraint. It may say that the injunction shall expire in a year or in six months or at any other stated time unless at or before such time the plaintiff shall satisfy the court that the rate is still inadequate. This will avoid the danger that the delays of litigation may continue the restraint of an injunction after the evil shall have vanished. But whatever the term of restraint, the privilege must at all times be reserved to the defendants to reinstate the suspended rates upon proof of changed conditions."

In the case of *Farmers Loan & Trust Co.* v. *Denver L. & G. R. Co.*, 126 Fed. Rep. 46, Circuit Judge Sanborn said, writing for the court (p. 51):

> "A court of chancery may, in a case in which the rules and principles of equity demand it, condition the grant of relief sought from it by a complainant with the enforcement of a claim or an equity held by a defendant, which, by reason of the statute of

> limitations or otherwise, the latter could not enforce in any other way."

In the case of *Union Central Life Ins. Co.* v. *Drake*, 214 Fed. Rep. 536, p. 548:

> "A court of equity may always require him who seeks equity to do equity, and in a case in which the rules and principles of equity demand it, as they do in the case at bar, it may condition the grant of relief sought from it by a plaintiff with the enforcement of a claim or an equity held by a defendant which by reason of the statute of limitations or a former judgment, the latter could not enforce affirmatively or in any other way."

In the case of *Turtle Creek Borough* v. *Pennsylvania Water Co.*, 243 Pa. 401, it was held that a court of equity in a suit to procure an inquiry into the reasonableness of proposed increased water rights, might direct a repayment to persons not named as direct parties to the bill of rates collected in excess of those determined by the court to be reasonable.

So running all through the decisions we find the rule to be that a court of equity in granting relief may surround its decree with such conditions and protections as to it may seem just and equitable. The court here has done no more than this.

There was no other way in which the court below could have protected the consumers, except by the imposition of these conditions, for the court recognized that *it was the policy of the State to regulate at all times the rates governing the sale of gas in the city of New York.* When

the court destroyed that rate as being inadequate it was really obligatory on its part to see to it that the company was not allowed to work a hardship upon the people, pending the appeal.

We suggest the court below dealt very leniently with appellant, for while it destroyed the rate fixed by the Legislature, it allowed appellant to raise the rate 50 per cent and permitted it to take down and use the moneys collected in excess of the statutory rate, pending the appeal.

It is quite apparent that this appeal resolves itself into an effort on the part of Mr. Carter, secretary of the company, to get before this court alleged results of operation down to February, 1921, and to do this without any opportunity on the part of defendants to combat such ex parte and self-serving figures, and to put into evidence the alleged high prices paid the Standard Oil Company for oil even in the face of falling prices.

The appeal is only a pretence. The real reason was as we say—for the purpose of injecting into the case 1920 and 1921 costs of operation.

Many of the items in Mr. Carter's alleged costs are improper, some are misleading and the whole setup is subject to the same criticism made by the court concerning the company's 1918 and 1919 figures, and in addition, they are further subject to the criticism made by defendants in their brief on the main appeal in No. 257.

No good purpose will be served by repeating these criticisms here and defendants will content themselves with asking the court to pay no attention to Mr. Carter's figures.

Prior to and after these figures were prepared

prices dropped precipitately. In fact, gas oil at the refineries went down from 9 cents a gallon in August, 1920, to $2\frac{3}{4}$ cents a gallon in February, 1921 (p. 40, record in 288), and gas oil could have been bought and delivered in New York on February 26, 1921, the day Mr. Carter swore to his affidavit, for 6 cents a gallon (p. 41, record No. 288).

Bituminous coal fell from $12 a ton at the mines in August, 1920, to $2.50 and $1.50 (p. 41, record No. 288), a decrease of 87 per cent.

Anthracite steam coal, No. 3 buckwheat or barley, fell from $6.50 a ton delivered in New York, in July, 1920, to 50 cents a ton (p. 41, record No. 288). This makes Mr. Carter's affidivit seem ridiculous enough.

In short the good old days when prices of oil and coal made it possible for complainant to make, under the statutory rate of 80 cents a thousand cubic feet, in excess of 6 per cent over a period of thirteen years, $27,785,497.18, (see p. 61, Newton's brief on appeal in 257), are upon us again.

Naturally the complainant objects to any restriction.

The complainant says in its brief (p. 9), that the Legislature has been free to establish a lower rate than $1.20 per M. and the Public Service Commission could have done so since March 30, 1921.

It would be quite unlikely for the Legislature to establish a new rate when the Attorney-General of the State has shown that the 80 cent rate is adequate, and has every reason to believe

this court will uphold the constitutionality of it and reverse the lower court — and this is true of the Public Service Commission.

In other words the State authorities maintain the 80-cent rate is adequate and affords complainant a fair return on the fair value of its property used and useful in the public service, and expect confidently the decree declaring it unconstitutional will be reversed here. It would be folly to fix a new rate under such claims.

Complainant says in substance that the conditions in the decree were the usurpation of legislative functions, viz., rate making (p. 14, its brief). We contend and it was evidently intended that they were merely the imposition of conditions — imposed in granting equitable relief — some protection to consumers pending the appeal.

In the prior suit the money collected in excess of the statutory rate upon granting a preliminary injunction, was impounded the same as here. The result was that the company still has possession of some $430,692.63 (pp. 12611–12621, Record No. 257) of such money.

In the *Kings County Lighting Co.* v. *Woodbury*, 110 Misc. 204, the plaintiff has possession of some $600,000 collected in excess of the statutory date which it refuses to return.

It is possible the court below had in mind these cases and the conduct of the Lincoln Gas & Electric Company in the celebrated case of that name (233 U. S. 349; 250 U. S. 356).

This court knows the efforts on the part of the consumers of that company to obtain a return of the moneys paid in excess of the statutory rate.

Because some of the judges in the same district court have refused to limit the rate pending appeal is no reason why such power should not be exercised.

The complainant is now and has been since February 28, 1921, absolutely unregulated as to the rate it shall charge its consumers and to this extent the decree is still a hardship on the consumer.

POINT II

THAT PORTION OF THE DECREES OF AUGUST 11, 1920 AND FEBRUARY 28, 1921 APPEALED FROM SHOULD BE AFFIRMED WITH COSTS TO THE APPELLEES.

Dated New York, November 14, 1921.

Respectfully submitted,
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